95-1175

Supreme Court, U.S.
FILED
JAN 22 1996
CLERK

No. 95-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOSE R. BRAVO, JAMES G. HUTTO,
RICHARD D. LICHTERMANN, GROVER N. LIPE, JR.,
MARK S. LOMBARDO, EDWARD A. LYONS,
and STEVEN R. OLIVER,

Petitioners,

v.

NATIONAL MEDIATION BOARD and AIR LINE
PILOTS ASSOCIATION,

Respondents.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

PETITION FOR A WRIT OF CERTIORARI

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January 1996

34 pp

QUESTION PRESENTED FOR REVIEW

Did the Circuit Court's affirmance of the dismissal of petitioners' complaint under Federal Rule of Civil Procedure 12(b)(1) violate the First and Fifth Amendments to the Constitution of the United States or the Railway Labor Act, where:

I. petitioners incorporated in the complaint expert scientific evidence never before considered by any court, demonstrating that respondent National Mediation Board's "majority-of-the-majority" election-rule and standard ballot (i) are unreasonable and unreliable means to determine the will of a majority of employees in a "craft or class" as to union representation, but (ii) under the circumstances of this case caused (and in any similar case will likely cause) certification of a *minority* representative;

II. the evidence showed that use of that rule and ballot to certify respondent Air Line Pilots Association as a *minority* representative

A. deprived petitioners of rights guaranteed by the First and Fifth Amendments to the Constitution of the United States; or, in the alternative,

B. was a gross violation of the Railway Labor Act;

III. the Circuit Court's judgment precluded the use of petitioners' expert scientific evidence to challenge the competence of the National Mediation Board's election-procedures (and in all cases similar to this will preclude the use such evidence); and

IV. the Circuit Court's judgment in this case licensed (and in all cases similar to this will license) the National Mediation Board to certify a union as the representative of a "craft or class", notwithstanding that that union is designated by only a *minority* of the employees eligible to vote?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties in the United States Court of Appeals for the District of Columbia Circuit included:

(i) Jose R. Bravo, James G. Hutto, Richard D. Lichtermann, Grover N. Lipe, Jr., Mark S. Lombardo, Edward A. Lyons, Steven R. Oliver, and Federal Express Pilots for a Non-Union Operation, Inc., plaintiffs-appellants. The individuals are petitioners here.

(ii) the National Mediation Board and the Air Line Pilots Association, defendants-appellees. These parties are respondents here.

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ALPA	Air Line Pilots Association
App	Separate Appendix to this Petition
FedEx	Federal Express Corporation
FEPNO	Federal Express Pilots for a Non-Union Operation, Inc.
FRCP	Federal Rules of Civil Procedure
NMB	National Mediation Board
NLRA	National Labor Relations Act
RLA	Railway Labor Act

No. 95-

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JOSE R. BRAVO, JAMES G. HUTTO,
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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Pursuant to Rules 12 through 14 of the Rules of this Court, Jose R. Bravo *et alia* (the "Pilots") petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

DECISIONS BELOW

The Court of Appeals' judgment is unreported, and appears in the Appendix filed with this Petition ("App") at 1a. The District Court's order is unreported; and its memorandum is unofficially reported at 148 L.R.R.M. 2142. The order and memorandum appear in App at 4a and 6a, respectively. The decisions of the National Mediation Board are reported at 20 N.M.B. No. 4, at 7; 20 N.M.B. No. 13, at 91; 20 N.M.B. No. 21, at 126; 20 N.M.B. No. 86, at 486; and 20 N.M.B. No. 106, at 659. These decisions appear in App at 90a, 87a, 81a, 30a, and 23a, respectively.

JURISDICTION

The Court of Appeals entered its judgment on 25 October 1995. This petition is timely under Rule 13.1 of the Rules of this Court. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves: (i) the First Amendment and the Due Process Clause to the Fifth Amendment to the Constitution of the United States; and (ii) Sections 1, First; 1, Fifth; 1, Sixth; 1a; 2, Third; 2, Fourth; 2, Ninth; 2, Eleventh; 4; and 5 of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.* The text of these provisions appears in App at 135a.

STATEMENT OF THE CASE

I. The parties. The Pilots are Flight Deck Crew Members of non-party Federal Express Corporation ("FedEx")[1] who are "employees" within a "craft or class" under RLA §§ 1, Fifth and 2, Fourth. Federal Express Pilots for a Nonunion Operation, Inc. ("FEPNO") is a corporation with supporters among Flight Deck Crew Members (including the Pilots) who oppose certification of any union as their representative. Before the National Mediation Board ("NMB"), FEPNO represented the Pilots and other identified Flight Deck Crew Members, as well as anonymous individuals who

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[1] "Flight Deck Crew Members" are active pilots on FedEx's seniority list.

feared blacklisting by the Air Line Pilots Association ("ALPA").[2] ALPA is a labor organization. FedEx is the largest American air-cargo carrier and a "carrier" under RLA § 1, First. The NMB is an agency of the United States, acting under color of RLA §§ 2, Ninth, 4, and 5. It investigated a "dispute" over union representation among the Flight Deck Crew Members, conducted two secret-ballot elections, and certified ALPA as the representative, under color of RLA §§ 1, Sixth and 2, Third, Fourth, and Ninth. Non-party United States Pilots Association ("USPA") is a labor organization which unsuccessfully sought election by "write-in" votes in the second election. App at 146a-48a.

II. The operative facts. On 14 June 1991, the NMB determined a "dispute" existed, and noticed an election. App at 140a, 90a. On 21 August 1992, ALPA objected to "carrier interference". App at 150a, 90a-91a.

On 22 August 1992, the NMB counted the ballots, and applied its "majority-of-the-majority rule". Under that rule:

- The NMB first determines whether a majority of eligible voters cast valid ballots for *some* representative.
- If less than a majority voted for *some* representative (*i.e.*, if at least 50% of eligible voters returned "void" or no ballots), the NMB certifies no representative.[3]
- If a majority voted for *some* representative, the NMB certifies the union that received a majority of the valid votes for *some* representative, although a majority of eligible voters did not designate that union in particular. App at 149a-51a, 88a n.1, 82a n.1.

Out of 2,279 pilots, 1,162 (50.99%) cast no ballots (in effect "voting" against representation); 1,112 (48.79%) voted for ALPA; and 5 (00.22%) voted for some other representative. The votes for *some* representative were less than a majority. App at 150a, 91a, 30a n.1.

After ALPA successfully pursued its claims of "carrier interference", on 19 October 1992, the NMB ordered a re-run election, using its standard ballot, with ALPA listed by name and

---

[2] *See Tony & Susan Alamo Fd'n v. Secretary of Labor*, 471 U.S. 290, 303 n.26 (1985).

[3] A "void" ballot is one with "no" or "no union" written on its face, or otherwise defaced.

a space for write-in votes. App at 133a. The ballot contained the following language:

> No Employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified. **Should a majority vote to be represented, the representative which receives a majority of the votes cast will be certified.**
>
> ---
>
> If you desire to be represented by:
> Air Line Pilots Association
>
> Mark an "X" in this square.....[ ]
>
> ---
>
> If you desire to be represented by:
> ANY OTHER ORGANIZATION OR INDIVIDUAL
> Write name of such organization or individual on the line below:
>
> _____ AND
>
> Mark an "X"in this square.....[ ]
>
> _____

App at 150-51a, 235a (emphasis supplied in **bold-face type** states the "majority-of-the-majority rule"). FEPNO opposed the ballot, moving that

> the [NMB] should use a ballot without a space for write-in votes, or, if the [NMB] use[d] its standard ballot, the [NMB] should require that a majority of eligible voters cast valid votes for ALPA or USPA in order for either organization to be certified and should include a statement on the ballot to that effect.

FEPNO also challenged USPA's participation. But the NMB denied the motion. App at 88a.

In the second election, USPA ran a "write-in" campaign. One of its slogans was that a Flight Deck Crew Member who voted "NO" was effectively voting for ALPA:

- "A 'NO' VOTE...IS A VOTE FOR ALPA!"
- "To vote 'NO' at this time, will ensure that the Air Line Pilots Association is certified as our bargaining agent.
- "2. *Is a vote for USPA a vote for ALPA?*
  "No. According to NMB rules, if the majority of pilots votes for union representation, then the union that receives the majority of votes cast becomes the representative for the pilots.
  "3. *What if I vote 'NO' again?*
  "Given the closeness of the last election, we feel the option of two unions makes representation inevitable.
  To vote NO at this point is in fact a vote for ALPA! The choice is yours."

USPA also used a telephone "hot-line" which represented that a "no vote" was a vote for ALPA. App at 151a-52a, 237a, 240a, 241a, 82a. In fact, a vote for USPA turned out to be a vote for ALPA.

On 14 January 1993, the NMB counted the ballots. Of 2,279 eligible voters, 1,015 (44.53%) voted for ALPA; 271 (11.89%) voted for USPA; and 993 (43.57%) cast no or void ballots (in effect, "voting" against representation). App at 31a. Thus, ALPA received a majority of the votes for *some* representative (1,015 out of 1,286), but less than a majority of eligible voters. Analysis shows the closeness of the vote:[4]

	First Election	Second Election	Difference
ALPA	1,112	1,015	-97
other	5	0	-5
no union	1,162	993	-169
USPA	0[5]	271	+271

[4] These figures are drawn from App at 30a n.1, 31a.

[5] USPA did not participate in the first election.

Had 147 of the 174 "no union"and "other" votes (6.45% of eligible voters) not shifted to USPA, the result would have been: ALPA, 1,015 (44.53%); USPA, 124 (5.44%); and "no union", 1,140 (50.02%). Under those circumstances, the NMB would have certified no representative, as "no union" would have had one-half *plus* one of eligible votes (*i.e.*, 1,140 for "no union" *versus* 1,139 for ALPA and USPA combined).

The NMB certified ALPA only because the "majority-of-the-majority rule" added the votes for USPA to those for ALPA. Neither union received a majority of eligible votes. Moreover, in the first election, ALPA received 1,112 votes (a minority, 48.79% of eligible voters), and was not certified; whereas, in the second election, ALPA received only 1,015 votes (even a smaller minority, 44.53% of eligible voters), but was certified.

On 19 January 1993, FEPNO requested that the second election be set aside, because of USPA's involvement, coupled with use of the "majority-of-the-majority rule" and standard ballot. App at 32a-33a & n.2, 41a-47a. FEPNO submitted affidavits from Flight Deck Crew Members showing that:

- Some opposed ALPA, or representation by any union, but felt compelled to vote for USPA to have a voice in selection of a representative.
- Although some voted for USPA, they would have returned no ballot (*i.e.*, voted "no union") had ALPA been the only choice on the ballot. App at 44a-46a.

On 14 June 1993, the NMB rejected FEPNO's objections, and certified ALPA. App at 79a. Although finding that "USPA's slogan did not constitute a misrepresentation of [NMB] voting procedures and policies", the NMB admitted that

> several crewmembers may have been uncertain whether the best way to defeat ALPA was to vote "no" (or not to vote), or to support USPA. Individual crewmembers weighed the effect of their vote against the anticipated votes of their fellow crewmembers. Several crewmembers were convinced that some form of representation was inevitable and decided to support USPA as the alternative to ALPA. Others believed that, because in their judgment a majority vote for representation

> was not inevitable, it was possible to avoid representation altogether by not returning a ballot.

App at 74a. The NMB denied FEPNO's motion for reconsideration. App at 29a.

III. The Pilots' claims in the District Court. The Pilots and FEPNO brought a civil action, alleging that use of the "majority-of-the-majority rule" and standard ballot was repugnant to the First and Fifth Amendments; or that that use contravened RLA §§ 1a, 2, Fourth, and 2, Ninth. They sought declaratory and injunctive relief, to set aside the certification of ALPA and prohibit the NMB from holding any further election at FedEx unless it adopted an election-rule under which a union must receive a majority of the eligible votes in order to be certified. App at 157a-66a.

The complaint incorporated the affidavit of Professor William Crain. App at 156a ¶ 40, 167a-242a. Crain is an expert in the "Theory of Public Choice", a principal focus of which is how alternative voting-rules affect elections. App at 169a, 176a-77a.[6]

A. The "majority-of-the-majority rule". Crain testified that, in an election with three options (*e.g.*, ALPA, USPA, and "no union"), the "majority-of-the-majority rule" is not an effective means to determine the choice of a majority of eligible voters, compared to various alternative rules. App at 178a, 184a-86a. Crain showed how the "majority-of-the-majority rule" could result in certification of the wrong union (ALPA *versus* USPA) when the actual preference of the majority of eligible voters is *no* union. App at 178a-82a. As Crain explained:

> the NMB accepted as the fact, that some significant number of voters who actually preferred no union at all voted for USPA (a second-best option) only in order to avoid ALPA (the worst option from their point of view).
>
> (a) The decision of some employees *not* to support the outcome they most preferred * * * raises an important and

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[6] As Crain's affidavit was incorporated in the complaint, his testimony had to be taken as true for purposes of respondents' later motions to dismiss. *See* 2A *Moore's Federal Practice* ¶ 12.07[2.-5], at 12-86 to 12-91 & nn.9-12, 18.

> distortive aspect of the NMB's "majority-of-the-majority" rule: namely, that that rule creates an incentive for * * * *strategic voting behavior*, or *gaming behavior*. * * *
>
> (b) Importantly, because the chances that one union wins is tied directly to the votes for other unions under the NMB's "majority-of-the-majority" rule, strategic voting behavior increases the possibility that the outcome least preferred by the majority will win. In the Federal Express election, if an employee who favored no union representation believed that a majority would vote for either ALPA or USPA, and even though ALPA was his or her least desired outcome, a strategic vote for USPA increased the chances that ALPA would win. In effect, strategic voting intended to avoid the worst-case outcome actually had exactly the opposite effect: it increased the chances that the least preferred option would win. If the union votes were not linked (*i.e.*, under an election-rule other than the "majority-of-the-majority" rule), this would not be the case. A strategic vote for a second-best option would not work to the advantage of the least desired outcome.
>
> * * * [T]he direct link between the votes for any union under the "majority-of-the-majority" rule makes the problem of biased and misleading information particularly acute. Information that leads employees to expect that some union will be certified encourages strategic voting. In consequence, this reduces the chances that the majority's preferred outcome will win, and increases the chances that the least preferred outcome will win. [Footnote omitted.][7]

Crain also conducted scientific experiments showing that voters do *not* select the desired outcome using the "majority-of-the-majority rule", but would select that outcome using a run-off election. App at 178a-90a, 192a-93a.

B. The standard ballot. To evaluate the standard ballot, Crain conducted a scientific experiment showing that the ballot "is biased in favor of union certification", and that "a simple, inexpensive

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[7] The NMB admitted that "strategic voting" did take place in the second election. App at 74a, quoted *ante*, at 6-7.

alternative ballot design that explicitly includes the option for an employee to vote for 'No Union' would eliminate the bias". App at 187a, 190a-93a.

Crain concluded that the "majority-of-the-majority" rule and standard ballot

> create the potential conditions for the worst of all possible worlds * * * . With a biased ballot that favors union certification, and the outpouring of information designed to influence expectations that some union would be certified, some employees would reasonably vote for USPA in an effort to defeat ALPA, although those employees would actually prefer a "no union" option to representation by either USPA or ALPA. * * * The factual context * * * raises reasonable and serious doubts that a majority of the employees desires to be represented by ALPA. The most straightforward way to deal with these doubts would be to hold a run-off election between ALPA and "no union" * * * .

App at 193a.

IV. The District Court's decision. The District Court granted the NMB's and ALPA's motions to dismiss under FRCP 12(b)(1). App at 4a, 6a & n.1, 22a. The court made no findings of fact. Rather, it merely noted that the NMB and ALPA "disagree[d] with the conclusions * * * in Crain's affidavit", and "contest[ed]" "Crain's theories and speculations"; but it did not "delve further into the issues and arguments presented by the Crain Affidavit". App at 12a, 14a, 22a.

The court held that the NMB's " 'decision on [the rules governing elections] is not subject to review where there is no showing that it has acted in excess of its statutory duty' ", and that "the merits of [the Pilots'] statutory claims have been previously decided" in various cases (none of which, however, contained the scientific evidence incorporated in the Pilots' complaint). The court also held the Pilots' constitutional claims foreclosed by various cases (again, none of which contained the scientific evidence incorporated in the Pilots' complaint). App at 15a-22a.

V. The Court of Appeals' judgment. The Court of Appeals affirmed, on the grounds that a court

> may review NMB certifications "only upon a 'showing on the face of the pleadings that the certification decision was a gross violation of the [RLA] or that it violated the constitutional rights of an employer, employee, or Union.' " *Professional Cabin Crew Ass'n v. NMB*, 872 F.2d 456, 459 (D.C. Cir. [1989]) (*quoting International Ass'n of Machinists v. TWA*, 839 F.2d 809, 811 (D.C. Cir. [1988])[,]

and that the Pilots

> allege[d] bias in NMB's standard ballot and "majority-of-the-majority" voting rule through a study attached to [their] pleading. This court will not review these procedures for inherent bias unless this bias is of a constitutional dimension. *See International Ass'n of Machinists*, 839 F.2d at 812 n.1. One sparse study offered by [the Pilots] does not approach this threshold.

App at 2a. This petition followed.

ARGUMENT FOR ALLOWANCE OF THE WRIT

The integrity of the entire system of union representation under the Railway Labor Act is at issue in this case. Here, ALPA has been certified as the Pilots' representative although it was indisputably designated by only a *minority* of those in the "craft or class" eligible to vote—notwithstanding both the mandate of RLA § 2, Fourth that "[t]he majority of any craft or class of employees shall * * * determine who shall be the representative", and this Court's ruling that that section "confer[s] the right of determination upon a majority of those eligible to vote". *Virginian Ry. v. System Fed'n No. 40*, 300 U.S. 515, 560 (1937). And here, *for the first time in American labor-law history*, actual scientific analyses and controlled experiments (which at this juncture must be deemed true) have proven that the NMB's "majority-of-the-majority rule" and standard ballot—through the use of which that *minority* union was certified—are incompetent to determine the will of the "majority of those eligible to vote". Yet the lower courts have ruled that science

be damned and the NMB be suffered to certify *minority* unions as it pleases.

This unprecedented and rationally indefensible decision vitiates this Court's determination of what constitutes "majority" rule under the RLA, guarantees labor unrest in interstate commerce, deprives the Pilots of fundamental constitutional rights, and perpetuates the NMB's gross violation of the statute in every other close union-representation election that will hereafter occur under the RLA. As this Court is the final arbiter of both the "majority" rule and the ballot in RLA elections,[8] a grant of the Pilots' petition is imperative to save union representation under the RLA from the perversion of *minority* rule.

I. By licensing the NMB to certify *minority* unions as representatives under the Railway Labor Act, the Circuit Court's judgment endangers labor peace in interstate commerce.

As noted above, at FedEx the "majority of those eligible to vote" has *not* "determine[d] who shall be the representative". Rather, *the NMB* has determined that ALPA shall be the representative: (i) based on the theory that a majority vote for *some* representative (*i.e.*, a vote for *any* union) should be taken as a designation specifically of *ALPA* perforce of the "majority-of-the-majority rule"; and (ii) through the use of the NMB's standard ballot; but (iii) notwithstanding that the Pilots' scientific evidence proves the rule and ballot fatally defective. And the Circuit Court has approved this designation of a *minority* representative without even allowing inquiry into the Pilots' scientific evidence. This unprecedented judgment guarantees labor unrest in the arteries of interstate commerce.

Majority rule insures labor peace. *See Virginian Ry.*, 300 U.S. at 553-54. Absent this Court's reversal of the Circuit Court's judgment, where unions have been designated after a close vote using the "majority-of-the-majority rule" and standard ballot, no

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[8] *See Virginian Ry.*, 300 U.S. at 560; *BRAC v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 669-71 (1965).

employee will believe that such unions necessarily have majority status. Every such election will be tainted with patent injustice.[9] The very posturing of such unions as representatives will create irreconcilable antagonisms among employees, encourage employers to engage in hard bargaining on the presumption that minority unions are unable to prevail in strikes, and generally conduce to a climate of conflict ever ready to break out into industrial strife.

Thus, the Circuit Court's judgment undermines the RLA's regime of industrial peace in the worst way imaginable.

II. The Circuit Court's judgment abridges the Pilots' freedom of association, guaranteed by both the Railway Labor Act and the Constitution.

The Circuit Court's judgment also casts aside the fundamental protection true majority rule provides to the Pilots' freedom of association, thereby abridging that freedom. The court refused to "review [the NMB's election] procedures for inherent bias unless this bias is of a constitutional dimension", and denigrated the Pilots' scientific evidence as "one sparse study" which "does not approach this threshold". App at 2a. This implies that proof the NMB's procedures result in certification of a *minority* union has no constitutional (or statutory) significance. Nothing could be further from the truth.

A. RLA § 1a guarantees "freedom of association among employees", a freedom also protected by the First Amendment to the Constitution. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977); *BRT v. Virginia* ex rel. *Virginia State Bar*, 377 U.S. 1, 5-6 (1964).[10] Operationally, RLA § 2, Fourth collectivizes that freedom by giving "[t]he majority of any craft or class * * * the right to determine who shall be the representative". The Pilots' participation in this determination itself involved one involuntary

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[9] Cf. H. Arkes, *First Things: An Inquiry into the First Principles of Morals and Justice* (1986), ch. III, especially at 46-47.

[10] Freedom of speech is also involved, because the purpose of the association among employees is "representation" (*i.e.*, speech). The Pilots will label this complex of freedoms simply "freedom of association".

associational relationship. When the NMB certified ALPA, a second on-going, involuntary associational relationship was created between the Pilots and the union.

This involuntary association has significant coercive aspects. Under "exclusive representation", the Pilots may not bargain individually with FedEx. *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 200 (1944); *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346-47 (1944).[11] Exclusive representation "extinguishes the individual[Pilot]'s power to order his own relations with [FedEx] and creates a power vested in [ALPA]" and "strip[s the Pilots] of traditional forms of redress". *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). As a consequence of abridging the Pilots' freedom of association, exclusive representation also eliminates their freedom of contract. *Contrast Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 250-53 (1917), *with Allis-Chalmers* and *Vaca*, *ante*.

A further associational relationship may arise if ALPA and FedEx agree that "all employees shall become members of" ALPA, under RLA § 2, Eleventh. Although such an "agency shop" can require only payment of money, payments in excess of a union's costs of collective bargaining violate the First Amendment. *Ellis v. BRAC*, 466 U.S. 435, 455 (1984). That such an agreement is "a significant impingement on First Amendment rights" shows that representation by a union implicates First-Amendment issues. *See id.* at 455. For *only* "a labor organization * * * designated and authorized to represent employees" may negotiate an agency shop under RLA § 2, Eleventh. If a union's attempt to charge employees for expenditures as their representative impinges on First-Amendment freedoms, then necessarily the election by which it became the representative does also.

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[11] The term "exclusive representation" derives from § 9(a) of the National Labor Relations Act ("NLRA"). 29 U.S.C. § 159(a). In construing RLA § 2, Fourth, *Steele* referred to "the like provision" of the NLRA (§ 9(a)), and cited NLRA precedents and legislative history as authority. 323 U.S. at 200, 202 n.3. This equation of the acts followed from earlier decisions. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44-45 (1937), *citing Virginian Ry.*, 300 U.S. at 548-49.

The "agency shop" may be constitutional, because the First-Amendment right not to associate with a union through compulsory fees ceases when Congress determines there is a compelling interest in having *a majority* of workers elect the union and having the union collect *properly limited* "agency fees"—which are the least-restrictive alternatives for designating a representative and financing its activities. Conversely, where a union collects fees for *non*bargaining activities, or is elected by only a *minority* of employees in the first instance, there is a First-Amendment violation, because neither is a compelling interest served nor is the least-restrictive means employed.

B. Infringements on First-Amendment rights are justified only if: (a) they serve compelling interests; (b) by the least-restrictive means; and (c) as demonstrated by the government with evidence in the record. *See, e.g., Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986); *United States v. Robel*, 389 U.S. 258, 267-68 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500, 514 (1964); *DeGregory v. Attorney General*, 383 U.S. 825, 829-30 (1966); *NAACP v. Button*, 371 U.S. 415, 444 (1963).

1. The Pilots assume *arguendo* the RLA serves compelling interests: (1) "[A]voidance of industrial strife, by conference between the *authorized* representatives of employer and employee". *Virginian Ry.*, 300 U.S. at 547 (emphasis supplied); *see* RLA § 1a(1). (2) Freedom of association for employees to designate *no* representative, and the NMB's duty to implement that choice. *Compare* RLA § 1a(2) *with Non-Contract Employees*, 380 U.S. at 669 n.5, *and Russell v. NMB*, 714 F.2d 1332, 1341-42 (5th Cir. 1983). These interests are served, however, only by identifying the Pilots' *true* representative (if any). *See Virginian Ry.*, 300 U.S. at 548.

2. Restriction of First-Amendment rights is permissible if "no greater than is essential to the furtherance of [the compelling] interest". *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Imposition of a representative infringes the Pilots' freedom of association. However, Congress has mandated in RLA § 2, Fourth that "[t]he majority * * * shall * * * determine who shall be the representative"—implying that a greater level of assent would frustrate industrial peace. Assuming *arguendo* that majority rule passes First-Amendment muster because it burdens the minority no

more than necessary to achieve industrial peace, the least-restrictive-alternative issue reduces to whether the NMB's rule and ballot *in fact* identify the *majority's true* choice in a close three-way election involving "strategic voting"—which they do not. *See* App at 178a-90a.

C. No precedent of this Court supports the Circuit Court's judgment.

1. This Court has never sustained *minority* representation under the RLA or the Constitution.

2. This Court has never upheld the "majority-of-the-majority rule", especially against a scientific showing that it results in certification of minority unions.

3. This Court has never upheld the standard ballot. *Dicta* in *Non-Contract Employees* stated that adoption of that ballot did not exceed the NMB's statutory authority. 380 U.S. at 669-71. No *constitutional* issue arose in *Non-Contract Employees*, however. In addition, the Court decided even the statutory issue in a factual vacuum. The challengers in *Non-Contract Employees* attacked the then-new ballot because it contained no "no union" box. But they did not prove the ballot discriminatory. For the NMB adopted the ballot only after the Court granted *certiorari*. *Id.* at 657. No evidence existed as to how the ballot might work in practice. The Court reasoned that a "no union" box was unnecessary based on the *assumption* that the ballot "might well be" favorable to *non*representation. *Id.* at 669 n.5. Here, the Pilots have disproved that assumption, showing that the standard ballot strongly promotes a vote for the union named thereon. App at 190a-93a.

4. The Circuit Court's judgment is the *first* decision of *any* court that squarely sustains ***proven minority*** rule under the RLA, because this is the first case in which scientific evidence as to the actual defects of the NMB's rule and ballot has ever been presented. *None* of the cases cited by the Circuit Court or the District Court involved such evidence.

D. In the absence of controlling precedent, the NMB must adduce evidence that the infringement of its "majority-of-the-majority rule" and standard ballot on the Pilots' First-Amendment rights narrowly serves compelling interests. *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1462-63 (D.C. Cir. 1985). This rule applies even in normal political elections. *E.g., Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222 (1989).

1. The NMB, however, has never tested its rule or ballot (as the Pilots have done) to determine whether they *actually* identify employees' ***true majority*** representatives. This is significant in assessing their unconstitutionality. *See Quincy Cable TV*, 768 F.2d at 1463. *No* court has scientifically determined that the rule and ballot actually do what the NMB supposes, or has even considered the Pilots' evidence which *falsifies and refutes* that assumption.[12] And the Circuit Court now says that such evidence is always irrelevant in any event.

2. This Court need not treat as irrebuttable the now falsified notion that the NMB's rule and ballot actually serve compelling interests. "[W]hen, as here, fundamental [First-Amendment] interests are patently burdened," a court "is required to overturn regulations that are premised on [agency] assumptions contradicted by facts". *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1259 (3d Cir. 1986). *See, e.g., City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986); *Crowell v. Benson*, 285 U.S. 22, 56-64 (1932); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 50-54 (1936); *Pickering v. Board of Educ.*, 391 U.S. 563, 578-79 & n.2 (1968).

3. This Court also need not defer to the Circuit or District Courts, because the latters' decisions are not premised upon an actual "weighing" of any evidence, but on an implicit—and improper—categorical rejection as a matter of law of the type of evidence the Pilots present.

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[12] This is the test of scientific knowledge this Court has adopted. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2796-97 (1993). Thus, all other cases cited by the Circuit and District Courts touching on the NMB's rule and ballot are irrelevant. *See New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1259-60 (3d Cir. 1986). For, in constitutional litigation, a full factual record is mandatory. *E.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 236-37 (opinion of Stewart, J.), 244 n.* (opinion of Stevens, J.)(1977); *Wheeler v. Barrera*, 417 U.S. 402, 426-27 (1974); *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 586-87 (1972). And the Pilots are entitled to a judgment on the evidence in *this* case, not upon some other record in which that evidence does not appear. *See Noto v. United States*, 367 U.S. 290, 299 (1961). *See also Quong Wing v. Kirkendall*, 223 U.S. 59, 64 (1912)("[l]aws frequently are enforced which the court recognizes as possibly or probably invalid if attacked * * * in a different way").

a. Crain's affidavit presents scientific proof, never adduced in any other case, that the NMB's rule and ballot are faulty, and in a close, three-way election conspire to create the "worst of all possible worlds": certification of a *minority* union *when the majority of employees desires no union at all*. App at 193a.

b. Because it was incorporated in the complaint, Crain's affidavit must be taken as true for purposes of a motion to dismiss. *See* 2A *Moore's Federal Practice* ¶ 12.07[2.-5], at 12-86 to 12-91 & nn.9-12, 18.

c. The lower courts should have considered Crain's affidavit, because "[c]ourts have authority to review NMB determinations * * * upon 'a showing on the face of the pleadings that the certification decision was a gross violation of the [RLA] or * * * violated the constitutional rights of an * * * employee' ". *Compare* App at 156a ¶ 40 *with Professional Cabin Crew Ass'n v. NMB*, 872 F.2d 456, 459 (D.C. Cir. 1989). And those courts should have deferred their "peek-at-the-merits" jurisdictional ruling until the merits were heard. *See Herbert v. National Academy of Sciences*, 974 F.2d 192, 197-98 (D.C. Cir. 1992).

4. The NMB's rule and ballot are entitled to no presumption of constitutionality. Judicial review of NMB actions extends to constitutional issues. *Professional Cabin Crew Ass'n*, 872 F.2d at 459. And in constitutional cases, "the standard of review is determined by the nature of the rights * * * violated rather than the power being exercised". *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981). Thus, in *Ellis*, which involved employees' freedom of association in the RLA "agency-shop" context, this Court placed the burden of proof on the union, negating the existence of a presumption of constitutionality where compulsory unionism is involved. 466 U.S. at 457 n.15.[13]

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[13] Even if a presumption of constitutionality did apply here, the Pilots would nevertheless be entitled to attempt to overcome it. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938); *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 204, 209-13 (1934). As even the Circuit Court has said, "[i]n the rare and unusual case where the complaint, as supported by objective facts, requires overturning the [NMB's] judgment notwithstanding the vigorous presumption of validity, the court has jurisdiction". *International Association of Machinists v. NMB*, 425 F.2d 527, 542-43 (D.C. Cir. 1970). That, however, is *this* case.

E. Neither the ballot nor the rule is narrowly tailored to serve the compelling interests subtending the RLA.

1. The ballot. The ballot discriminates in favor of the union identified thereon (here, ALPA) and against a "no union" vote, thereby promoting representation. App at 190a-93a. An RLA election is a governmentally compelled competition of associations and ideas: (i) representation *versus* nonrepresentation, and (ii) representation by union *X* (with its particular agenda) *versus* representation by union *Y* (with its particular agenda). Thus, a discriminatory ballot favors a particular state of association *vel non* and a particular message.

Such content discrimination "cannot be tolerated". *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991). "[G]overnment must remain scrupulously neutral when it regulates activity protected by the First Amendment". *SEIU v. FPPC*, 955 F.2d 1312, 1320 (9th Cir. 1992). This rule applies to laws that appear neutral but have discriminatory impacts, and recognizes no exemption for organized labor. *Minneapolis Star v. Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983); *see Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980). Content-based regulations are allowable only if the agency proves them both necessary and narrowly drawn to serve a compelling interest. *Boos v. Barry*, 485 U.S. 312, 321-22 (1988). The NMB's standard ballot fails this test.

a. A discriminatory ballot frustrates achievement of the RLA's compelling interest in labor peace by helping to impose a *false minority* representative. Because the RLA does not require employees to select *any* representative, no conceivable interest lies in the NMB's imposing one. The NMB "performs the 'function of a referee'. It does not select one organization or another". *See Non-Contract Employees*, 380 U.S. at 667, 669 n.5.

b. A discriminatory ballot is not the least-restrictive means to achieve the RLA's goals, because it favors a named union (here,

ALPA) over a write-in union (USPA) or "no union".[14] Crain's experiments prove that a ballot with boxes for "ALPA", "USPA", and "no union" would be neutral. App at 190a-93a. As such a ballot is undeniably feasible, the experiments establish that the standard ballot is not necessary. Moreover, the ballot's discriminatory character serves *only* an unconstitutional purpose. Therefore, this Court should presume the NMB uses the ballot unconstitutionally to promote a *pro*-union vote. *See Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985); *Mt. Healthy School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286-87 (1977).

2. The rule. a. The "majority-of-the-majority rule" embodies the *irrebuttable presumption* that, when the majority of eligible voters votes for *some* representatives, those voting for *any* representative thereby prefer the *particular* representative that obtains a "majority of the majority". An agency may declare proof of one fact *prima facie* evidence of another fact, *if* a rational connection exists between proof and inference, and *if* the presumption is *not* conclusive. *E.g., Manley v. Georgia*, 279 U.S. 1, 5-6 (1929); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 18-19 (1931). But a vote for union *X* and the conclusion that that vote should be counted for union *Y* have no rational connection.

(1) The presumption negates the command of RLA § 2, Fourth that "[t]he *majority of any craft or class* shall have the right to determine *who* shall be the representative" (emphasis supplied). The presumption decrees that the statutorily prescribed majority shall *not* have this right, but only a right to determine there will be *some* representative; and that "the right to determine *who* shall be the representative" is for the *ersatz* "majority *of the majority*"—which here amounted to a *minority* of the "craft or class". The NMB, however, has no "power to change the plain, literal meaning of the statute", by presumption or otherwise. *Detroit & T.S.L.R.R. Co. v. UTU*, 396 U.S. 142, 159 (1969).

(2) Although irrebuttable, the NMB's presumption is "not necessarily true in fact," must be "often contrary to fact" (as here),

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[14] The ballot's unconstitutionality is exacerbated where the involvement of three choices (ALPA, USPA, and no union) and the defective "majority-of-the-majority rule" caused "strategic voting" that further pressed the NMB's finger on the scales in favor of ALPA. *See ante* at 7-8.

and is unnecessary because the NMB "has reasonable alternative means of making the crucial determination" of the employees' actual preference. *Vlandis v. Kline*, 412 U.S. 441, 452 (1973); *Department of Agriculture v. Murry*, 413 U.S. 508, 514 (1973).

(a) That an employee votes for union *X* demonstrates he does *not* want union *Y* as his representative; for if he did, he could have voted for *Y*. Therefore, imputing his vote for *X* to *Y*, simply because a majority of employees voted for *X and Y*, is nonrational.

(b) The NMB presumes that if an employee votes for *X* he wants representation. Because of "strategic voting", however, his vote for *X* may demonstrate only that he wants no representation by *Y*; whereas, in run-off elections, he would vote for "no union" over *X* or *Y*. Thus, the NMB's presumption can coerce employees into voting for *unwanted* unions. *See* App at 178a-90a, 192a-93a.

(3) The presumption is unnecessary. Unlike a political election, where an office *must* be filled, under the RLA *no* representative need be selected. *Non-Contract Employees*, 380 U.S. at 669 n.5. Moreover, the NMB has reasonable alternative means of making the crucial determination—one or more run-off elections.

Therefore, the "majority-of-the-majority rule" is unlawful, because it embodies an irrebuttable presumption that unjustifiably infringes on First-Amendment freedoms.

b. The "majority-of-the-majority rule" also imposes *unconstitutional conditions* on employees.

(1) Perforce of the rule, in a close three-way election, to vote "no union" an employee risks having his least-preferred option between unions *X* and *Y* designated the representative, with no opportunity to choose between them. *See* App at 182a-84a. But to vote for *X* to *prevent* certification of *Y*, the employee must in effect also vote *for Y*. The rule thus conditions the employee's statutory right to vote for "no union" upon his surrender of both his statutory and constitutional freedoms not to associate with (by voting for) *X*, *Y*, or both.

(2) No agency of government may condition any public benefit on a recipient's surrender of statutory or constitutional rights. *E.g.*, *Branti v. Finkel*, 445 U.S. 507, 513-16 (1980); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233-34 (1977); *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *United States v. Robel*, 389 U.S. 258, 263-

66 (1967). *See generally*, Sullivan, "Unconstitutional Conditions", 102 *Harv. L. Rev.* 1413 (1989). Just as the NMB may not require an employee to vote for a particular union or to eschew voting for "no union" as a condition of voting, so too may it not achieve this result indirectly through the "majority-of-the-majority rule".

(3) A run-off election between the two choices with the greatest number of votes in the initial election (whether that be unions *X* and *Y*, or *X* and "no union") avoids any irrebuttable presumption or unconstitutional condition. Therefore, a run-off election is a less-restrictive alternative than the "majority-of-the-majority rule". Necessarily then, the rule is unconstitutional.

III. The Circuit Court's judgment presents the question of the unconstitutionality of the Railway Labor Act reserved in *Virginian Railway v. System Federation No. 40*, 300 U.S. 515 (1937).

This Court can also rule on due-process grounds that the "majority-of-the-majority rule" and standard ballot are not means "reasonably adopted to [an] end permitted by the Constitution", because they do not accurately determine the will of the majority of employees. *See Preseault v. ICC*, 494 U.S. 1, 17 (1990). Where First-Amendment freedoms are implicated, the Pilots have an *absolute* right to require that the NMB use rational fact-finding procedures. *Compare Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 304 n.13, 306-07 (1986), *with Carey v. Piphus*, 435 U.S. 247, 266 (1978). But, if the RLA does not require true majority support for a union to claim the status of an exclusive representative, then the Act violates the Due Process Clause of the Fifth Amendment.

Carter v. Carter Coal Co. held *un*constitutional exclusive representation in a labor act passed pursuant to the Commerce Clause.[15] 298 U.S. 238, 311 (opinion of the Court), 318 (Hughes, C.J., concurring) (1936); *see also A.L.A. Schechter Poultry Corp.*

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[15] The collective-bargaining provisions of the Bituminous Coal Conservation Act of 30 August 1935, ch. 824, § 4, Pt. III, 49 Stat. 991, 1001-02, *especially* Pt. III(g), 49 Stat. at 1002.

v. United States, 295 U.S. 495, 537 (1935).[16] *Carter* still controls this subject.[17]

After *Carter*, exclusive representation under the RLA and NLRA escaped review because, when the constitutionality of those acts was in issue, the government selected its test-cases "intentionally [to] avoi[d] presenting th[is] Court with th[at] 'touchy' and more doubtful question[ ] '". J.A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics and the Law, 1933-37* (1974), at 187. This Court avoided the problem of *exclusive* representation by construing the acts to permit employees to bargain individually. *Virginian Ry.*, 300 U.S. at 548-49; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).[18] Importantly, too, *Virginian Railway* construed RLA § 2,

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[16] *Carter* premised its holding on *Schechter* and on *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), and *Eubank v. City of Richmond*, 226 U.S. 137 (1912). Since then, these cases have received continuing approbation. *E.g., Eastlake v. Forest City Enterprises*, 426 U.S. 668, 677-78 (opinion of the Court), 683 & n.5 (Stevens, J., dissenting)(1976); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 6-7 (1974); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974); *New Motor Vehicles Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 125-26 & n.30 (1978) (Stevens, J., dissenting).

[17] *Pace Knight v. MCCFA*, 460 U.S. 1048 (1983), *aff'g* 571 F. Supp. 1 (D. Minn. 1982)(upholding exclusive representation in a public-sector collective-bargaining law). *Carter* is distinguishable from *Knight* because: In the public sector, there is no delegation of legislative authority to unions, as the governmental employer retains authority over the procedures and substance of collective bargaining. In the private sector, there is a delegation, as the government retains no authority over the substance of bargaining. *Contrast Knight*, 571 F. Supp. at 3-4, *with H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970), *and with Minnesota State Bd. for Comm. Colleges v. Knight*, 465 U.S. 271, 279 (1984).

[18] This reflected the positions of the litigants. *See* Arguments in Cases Arising Under the Railway Labor Act and the National Labor Relations Act Before the Supreme Court of the United States, February 8-11, 1937, S. Doc. No. 52, 75th Cong., 1st Sess. (1937), at 13, 33-34, 40, 88-89, 118. Later, in cases raising statutory issues only, this Court reinterpreted the RLA and NLRA to preclude individual contracts. *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346-47 (1944); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 334-39 (1944). Neither case reconsidered the constitutional matters discussed in *Virginian Ry.* and *Jones & Laughlin*, however. *See* Comment, "The Mechanics of Collective Bargain-

Fourth as "confer[ring] the right of determination [of a representative] upon a majority of those eligible to vote". 300 U.S. at 560. So, *no* decision of this Court has faced the issue of the constitutionality of *exclusive* representation by a *minority* union.

Here, the Circuit Court has held that *exclusive* representation by a *minority* union is constitutional. This judgment squarely presents the constitutional issues reserved in *Virginian Railway* and controlled by *Carter*.

IV. The Circuit Court's judgment licenses a "gross violation" of the Railway Labor Act.

The Circuit Court noted that courts may review NMB certifications if "the face of the pleadings" shows "a gross violation" of the RLA. App at 2a. The Pilots' complaint, incorporating Crain's affidavit, made such a showing. The Circuit Court explicitly ruled that "[o]ne sparse study offered by [the Pilots] does not approach" "bias of a constitutional dimension". App at 2a. Implicitly, the court also sustained the District Court's decision dismissing the Pilots' challenge on statutory grounds. *See* App at 15a-19a.

This Court has held that RLA § 2, Fourth "confers the right of determination [of a representative] upon a majority of those eligible to vote". *Virginian Ry.*, 300 U.S. at 560. Indisputably, ALPA was *not* designated by "a majority of those eligible to vote", but only by the NMB's *ersatz* "majority of the majority". And Crain's affidavit (which at this juncture must be taken as true) establishes that the NMB's rule and ballot do not conduce to the determination of the will of the required "majority of those eligible to vote". App at

---

ing", 53 *Harv. L. Rev.* 745, 789-91 (1940). The decision in *Steele* also pretermitted the unconstitutionality of exclusive representation, by creating the "duty of fair representation". *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 198 (1944). *See Vaca v. Sipes*, 386 U.S. 171, 182 (1967); Weyland, "Majority Rule in Collective Bargaining", 45 *Colum. L. Rev.* 556, 568-69 (1945).

192a-93a. Therefore, this case presents as clear-cut a "gross violation" of the RLA as is imaginable.[19]

Labor laws should be construed to avoid constitutional questions. *Steele*, 323 U.S. at 198-203; *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501 (opinion of the Court), 508-11 (Brennan, J., dissenting) (1979). Thus, rather than declare the "majority-of-the-majority rule" and standard ballot unconstitutional, this Court may invalidate them under RLA § 2, Fourth and Ninth.

Crain's affidavit shows that the NMB has "entirely failed to consider * * * important aspect[s] of the problem". *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In light of that showing a reasonable person could not arrive at the judgment the NMB has made, but instead would conclude either that "there has been a clear error of judgment" on its part, or that its rule and ballot are "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies" of the RLA. *Cf. Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1476 (D.C. Cir. 1984); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *United Steelworkers of America v. NLRB*, 646 F.2d 616, 629 (D.C. Cir. 1981). Certainly, the NMB cannot possibly explain how the RLA can tolerate an election-rule and ballot that are incompetent to perform their functions. *Cf. Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1497 (D.C. Cir. 1988); *Teamsters v. BRAC*, 402 F.2d 196, 205 (D.C. Cir. 1968); *Washington Central R.R. v. NMB*, 143 L.R.R.M. 2871, 2889 (E.D. Wash. 1993).

Thus, on their face the NMB's rule and ballot constitute a "gross violation" of the RLA, which supports subject-matter jurisdiction in the District Court.

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[19] That no specific statutory language prohibits a scientifically invalid rule and ballot is irrelevant. *See Railway Labor Executives Ass'n v. NMB*, 988 F.2d 133, 137-38 (D.C. Cir. 1993), *superseded*, 29 F.3d 655 (D.C. Cir. 1994).

CONCLUSION

The compelling issue in this case is: Can federal courts possibly lack subject-matter jurisdiction to determine whether the NMB's election-procedures are capable—as a matter of scientific fact—of determining the critical element in the scheme of union representation under the RLA: true *majority* rule? In NMB elections, *does truth count*? Or may the NMB designate a representative by casting goats' knuckles or divining birds' entrails? According to the Circuit Court, scientific exposure of the incompetence of the NMB's "majority-of-the-majority rule" and standard ballot may be dismissed as "one sparse study", without inquiry into the factual merits of the analysis and experiments performed, *and even though at this stage of the proceedings that study must be taken as true as a matter of law*. If such cavalier treatment suffices for *this* rule and *this* ballot, why not for *any* election-procedure? And if *no* scientific study may be interposed against *any* NMB election-procedure, then why should not goats' bones and birds' guts be as good as employees' votes to determine what a "majority" supposedly wants? Yet, surely, if voodoo is as valid as votes, then the Circuit Court has given a new dimension to the old saw "the law is an ass".

For all the foregoing reasons, the Pilots' petition should be granted.

Respectfully submitted,

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(2)

95-1175

No. 95-_____

Supreme Court, U.S.
FILED
JAN 22 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOSE R. BRAVO, JAMES G. HUTTO,
RICHARD D. LICHTERMANN, GROVER N. LIPE, JR.,
MARK S. LOMBARDO, EDWARD A. LYONS,
and STEVEN R. OLIVER,

Petitioners,

v.

NATIONAL MEDIATION BOARD and AIR LINE
PILOTS ASSOCIATION,

Respondents.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI

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Counsel of Record for Petitioners

January 1996

245 pp

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APPENDIX A

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

October 25, 1995

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 11, 1995 Decided October 25, 1995

No. 94-5357

Federal Express Pilots for a Non-Union Operation, Inc., Jose R. Bravo, James G. Hutto, Richard D. Lichtermann, Grover N. Lipe, Jr., Mark S. Lombardo, Edward A. Lyons, and Steven R. Oliver, Appellants

v.

National Mediation Board and Air Line Pilots Association, Appellees

---

On Appeal from the United States District Court for the District of Columbia (93cv02145)

United States Court of Appeals
For the District of Columbia Circuit
FILED Oct 25 1995

Before: Silberman, Sentelle and Henderson, *Circuit Judges.*

JUDGMENT

This appeal of an order of the District Court, which dismissed a challenge to the National Mediation Board (NMB), was considered on the briefs filed by the parties and the oral argument presented October 11, 1995. The court has determined that the issues presented do not require an opinion. *See* D.C. Cir. Rule 36(b). It is

ORDERED AND ADJUDGED that the District Court's order issued October 21, 1994, be affirmed in full. This court has repeatedly noted that it may review NMB certifications "only upon a 'showing on the face of the pleadings that the certification decision was a gross violation of the [RLA] or that it violated the constitutional rights of an employer, employee, or Union.'" *Professional Cabin Crew Ass'n v. NMB*, 872 F.2d 456, 459 (D.C. Cir.) (quoting *International Ass'n of Machinists v. TWA*, 839 F.2d 809, 811 (D.C. Cir.), *amended*, 848 F.2d 232, *cert. denied*, 488 U.S. 820 (1988)), *cert. denied*, 493 U.S. 974 (1989). In determining whether the NMB has grossly violated the RLA or violated the Constitution, a court may only take a "peek at the merits." *Professional Cabin Crew Ass'n*, 872 F.2d at 459 (citing *International Bd. of Teamsters v. Brotherhood of Ry., Airline &. S.S. Clerks*, 402 F.2d 196, 205 (D.C. Cir.), *cert. denied sub nom. Brotherhood of Ry., Airline & S.S. Clerks v. NMB*, 393 U.S. 848 (1968)). This "peek" must reveal an error patent on the face of the matter without resort to broad policy arguments. *Professional Cabin Crew Ass'n*, 872 F.2d at 459.

In this case, the petitioner alleges bias in NMB's standard ballot and "majority-of-the-majority" voting rule through a study attached to its pleading. This court will not review these procedures for inherent bias unless this bias is of a constitutional dimension. *See International Ass'n of Machinists*, 839 F.2d at 812 n.1. One sparse study offered by petitioners does not approach this threshold. This court must therefore affirm the District Court.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely position for rehearing. *See* D.C. Cir. Rule 41.

Per Curiam
For the Court:
Mark J. Langer, Clerk

By: /s/ Eva Brown
Deputy Clerk

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

APPENDIX B

ORDER OF THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

October 21, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Federal Express Pilots for a Non-Union Operation	:	**FILED:** OCT 21 1994
	:	CLERK, U.S. DISTRICT
Plaintiff,	:	COURT, DISTRICT OF
	:	COLUMBIA
v.	:	
	:	
National Mediation Board, et. al.,	:	Civil Action No. 93-2145 RMU
	:	
Defendants	:	Document No. 7, 8, 9, 10, 11, 12, 13, 14.

ORDER

For the reasons espoused in the Memorandum Order, it is this 21 day of October, 1994,

ORDERED, that the Motions of Defendant National Mediation Board and Defendant-Intervenor Airline Pilots Association to Dismiss be and are hereby **granted**; and it is

FURTHER ORDERED that this matter is hereby dismissed with prejudice.

SO ORDERED.

/s/
Ricardo M. Urbina

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APPENDIX C

MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA GRANTING DEFENDANTS' MOTIONS TO DISMISS

October 21, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Federal Express Pilots	:	**FILED:**
for a Non-Union Operation	:	OCT 21 1994
	:	CLERK, U.S. DISTRICT
Plaintiff,	:	COURT, DISTRICT OF
	:	COLUMBIA
v.	:	
	:	
National Mediation	:	Civil Action No. 93-2145 RMU
Board, et. al.,	:	
Defendants	:	Document No. 7, 8, 9, 10, 11, 12, 13, 14.

MEMORANDUM ORDER
Granting Defendants' Motions to Dismiss

This matter comes before the Court upon the Motions of Defendant National Mediation Board (NMB or Board) and Defendant-Intervenor Airline Pilots Association (ALA) to Dismiss the complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) or, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56, and Plaintiff's Oppositions thereto. Upon consideration of the motions, and the record herein, the Court determines that Plaintiff has failed to state a claim upon which relief may be granted and accordingly, the Court dismisses Plaintiff's complaint.[1]

---

[1] Because this Court finds that Plaintiff has failed to present a claim upon which relief may be granted, the Court does not reach the merits of the parties' motions for summary judgment.

The Parties

Plaintiff Federal Express Pilots for a Non-Union Operation (FEPNO) is a Tennessee corporation allegedly comprised of several hundred supporters among Federal Express (FEDEX) crew members (not all plaintiffs are named in the action) who are employees subject to exclusive union representation under Railway Labor Act (RLA) § 2, Fourth, but who are not in favor of certification of any union, including ALPA, as their representative under the RLA.

Defendant National Mediation Board (NMB) is an agency of the United States, created by and acting under color of RLA §§ 2, Ninth, 4 and 5. Under RLA § 2, Ninth, the NMB has investigated a dispute among the FEDEX crew members as to who shall be the exclusive representative of the latter; to conduct two elections among the crew members, and to certify that as a result of the second election, ALPA has been designated and authorized to represent the Flight Deck supporters of FEPNO, under RLA § 2, Third and Fourth.

Defendant-Intervenor Air Line Pilots Association (ALPA), is the union that the NMB has certified as the representative of FEDEX's crew members under 45 U.S.C. section 151, Sixth.

A. Plaintiff's Argument

Plaintiff FEPNO claims to have exhausted all administrative remedies and to lack an adequate remedy at law. Plaintiff asks this Court to: (1) declare that NMB's June 14, 1993, certification of ALPA as the RLA representative of the craft or class of crew members is void; (2) require NMB to set aside the certification of ALPA; (3) enjoin the NMB from holding any further election among the FEDEX crew members to determine an RLA representative, unless and until NMB adopts an election rule under which no union receiving less than a majority of the votes of from all eligible voters may be certified as the representative; (4) grant Plaintiff its cost and reasonable attorney fees and; (5) grant any further relief the Court may deem proper.

(a) Plaintiff's Constitutional Claims

Plaintiff argues that the requirement of RLA § 2, Fourth that the individual Plaintiffs herein and other supporters of FEPNO accept a collective "representative" as a condition of their employment by FEDEX when "[t]he majority of any craft or class of employees ... determine[s] who shall be the representative...." infringes on its:

> (a) freedom not to associate with a union or labor organization and freedom of speech, protected by the First Amendment to the Constitution of the United States, and
>
> (b) freedom of contract, protected by the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

Plaintiff alleges that: (1) NMB's use of the "majority of the majority" rule in the Second election, which resulted in ALPA's selection as the representative; (2) NMB's use of its standard ballot in the Second election and; (3) NMB's combined use of the majority of the majority rule and standard ballot procedure in the Second election was violative of the Plaintiff's rights in that it:

> (a) did not advance any compelling, substantial or legitimate governmental interest superior to Plaintiff's constitutional rights;
>
> (b) was not the least-restrictive means of infringing on Plaintiff's rights;
>
> (c) was not rationally related to a legitimate governmental interest; and
>
> (d) prevented the achievement of the legitimate governmental interest sought to be advanced by the RLA.

Plaintiff further alleges that it is suffering and will suffer irreparable injury from the abridgement of its First and Fifth

Amendment freedoms as a result of the Second election and from: (1) the NMB's purported certification of ALPA as the RLA representative; (2) ALPA's claim to be such a "representative"; (3) the RLA requirement that FEDEX confer and bargain exclusively with ALPA and; (4) the RLA requirement that FEDEX not confer and bargain with the Plaintiff concerning the crew members' terms and conditions of employment.

(b) Plaintiff's Statutory Claims

Plaintiff argues that (1) the NMB's use of the majority of the majority rule; (2) its use of a standard ballot in the Second election and; (3) its combined use of its majority of the majority rule and standard ballot procedure in the Second election was violative of Plaintiff's rights in that it:

(a) contravened RLA sections 1a, 2, Fourth and 2, Ninth;

(b) did not serve and was inconsistent with the purposes of the RLA and was a gross violation of statutory policy;

(c) failed to fulfill NMB's statutory duty to "investigate" a representational dispute as to allow full and free expression of employee desires with regard to collective representation;

(d) failed to fulfill the NMB's statutory duty to find "who shall be the representative" of "the majority of the craft or class"; and

(e) was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the requirements of the RLA.

Plaintiff further alleges that it is suffering and will suffer irreparable injury from abridgement of their statutory rights under the RLA as a result of the Second election and from: (1) the NMB's purported certification of ALPA as the RLA representative; (2) ALPA's claim to be such a "representative"; (3) the RLA requirement that FEDEX confer and bargain exclusively with ALPA and; (4) the RLA requirement that FEDEX not confer and bargain

with the Plaintiff concerning its terms and conditions of employment.

Plaintiff acknowledges that the NMB's majority of the majority rule has been upheld or has received favorable treatment in several cases. However, Plaintiff argues that: (1) the status of the individual Plaintiffs herein and other supporters of FEPNO as employees, and the fundamental constitutional rights they assert in their First Claim for Relief and; (2) the scientific analysis and experimental evidence set out in the Affidavit of Professor William Mark Crain, in support of Plaintiff and here presented for the first time in any litigation known to Plaintiff, distinguish this case and provide the basis for Plaintiff's good-faith argument for the extension, modification, or reversal of existing law as it may have been applied to date.

B. Defendant National Mediation Board's Argument

Defendant's main contentions can be summarized as follows:

(1) the Board's election procedures, including the use of the "standard ballot" and the "majority of the majority rule", in the Second election did not violate the RLA;

(2) the Board satisfied its duty to investigate the representational dispute;

(3) the provisions of the RLA permitting the challenged election procedures are constitutional because (a) the Right of Association does not require selection of a representative by a majority of all members entitled to vote and (b) Plaintiff's constitutional rights were not implicated by the challenged election procedures since employees remained free to voice their opinions;

(4) even if Plaintiff's rights were implicated, the Court should nevertheless uphold section 152, Ninth of the RLA.

Defendants asserts that Congress created the Board to administer the RLA and assigned to it, inter alia, the duty to investigate representation disputes, hold elections and certify collective bargaining representatives for crafts or classes of employees. Defendant contends that Congress granted the Board wide-ranging discretion in the administration of its duties under 45 U.S.C. Section 152, Ninth. Defendant argues that this Court cannot properly exercise subject matter jurisdiction over the Board's certification decision because Plaintiff has failed to establish, on the face of the pleadings, either that the certification decision was a "gross violation" of the Act or that the Board's action violated the constitutional rights of the employees.

Defendant also urges that the "gross violation" language applies when the Board has acted in excess of its delegated powers and contrary to a specific prohibition in the Act. To determine whether the Board has committed a gross violation of the Act, the Court may take a "peek at the merits."[2] Defendant contends that this Court should proceed no further because a "peek at the merits" would reveal no error that is obvious on the face of the papers.

In response to Plaintiff's objection to the NMB's use of the "standard ballot," Defendant asserts that the Board normally uses its standard ballot in representation elections and that courts have uniformly upheld the use of the standard ballot in this manner. The Act, Defendant contends, leaves the form of the ballot to the Board's discretion. Regarding Plaintiff's argument against the "majority of the majority" rule, Defendant contends that courts have rejected the notion that the Act requires selection of a representative by the votes of a majority of eligible voters. In response to Plaintiff's objection to both the "standard ballot" and the "majority of the majority" rule, Defendant asserts that the two procedures are always use in tandem and that this combined use has been previously upheld by the Court.

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[2] Professional Cabin Crew Ass'n v. NMB, 872 F.2d 456, 459 (D.C. Cir.), cert. denied, 493 U.S. 974 (1989).

In response to Plaintiff's argument that the Board breached its duty to "investigate" the FEDEX representation dispute because the election procedures did not properly disclose the employee's representation preferences, Defendant asserts that the Board fulfilled its statutory duty in this regard. Defendant contends that the Act requires no particular form of investigation and commits the specific form of an investigation in each particular case to the NMB's broad discretion. In determining whether the Board has committed a statutory or constitutional violation of its duty to investigate, Defendant argues that this Court is limited to deciding whether the Board performed an investigation. Defendant asserts that, in the present case, the Board performed such an investigation.[3]

Defendant refutes Plaintiff's claim that this case implicates the latter's right to associate for the purpose of engaging in those activities protected by the First Amendment. Defendant asserts that courts have long-recognized that the absence of a "no union" box on the standard ballot may, in fact, bias it in favor of not certifying a union because disinterested employees will not vote. Defendant argues that the majority of the majority rule does not implicate Plaintiff's constitutional rights because each employee remains free, at all times, to vote for whatever union he/she desires, or for no union at all, and the Board properly considers the vote as it was cast.

Defendant disagrees with the conclusions set forth in Crain's affidavit in support of Plaintiff. Specifically, Defendant argues that Crain's conclusion that two-thirds of the "indifferent" employees may vote for either of the two union candidates is wrong because it assumes that an employee who votes for a union is "indifferent." An employee who chooses to vote, Defendant asserts, cannot logically be considered indifferent since, by voting, that employee affirmatively establishes that she is not indifferent. Defendant contends that Crain's opinion and experiment also ignore the

---

[3] Defendant states that the Board investigated ALPA's representation request; held an election; investigated allegations of interference; issued findings of facts; held a re-run election; investigated allegations of interference filed by FEPNO and FEDEX; issued findings of fact; and certified ALPA.

"human nature" element of the presumption: that some of those who favor representation will fail to vote and thereby be considered to have voted against representation.

Defendant contends that Plaintiff's constitutional right to, inter alia, freedom of association and freedom of expression under the First Amendment to the United States Constitution have not been violated: the Supreme Court has upheld 45 U.S.C. section 152, the provision of the RLA which allows an employer and a union to require all employees to become members of the certified union, including employees who voted against the union. Moreover, Defendant asserts that the individual plaintiffs in this case have not even been required to join or financially support ALPA.

Regarding Plaintiff's argument that the NMB, by certifying ALPA, has interfered with its "freedom of contract" protected by the Due Process clause of the Fifth Amendment, Defendant argues that Plaintiff's claim should be dismissed under long-standing precedent establishing that the RLA provisions do not violate such a right.

Defendant contends that, while Plaintiff is free to seek reversal of precedents through this litigation, Plaintiff's claims warrant no extension, modification or reversal of existing law. Nonetheless, if the Court were to proceed further, Defendant argues that it should uphold the challenged provision of the RLA as rationally related to a compelling government interest. Defendant asserts that the Court's review of Congress' exercise of Commerce Clause power is extremely deferential so as to ensure only that the means selected by Congress are reasonably adapted to the end permitted by the Constitution. Defendant contends that the challenged provision satisfies each element of the rational relation test and that the government's interest in promoting labor peace and stability in interstate commerce constitutes a compelling governmental interest. To the extent, if any, that the standard ballot and majority rule in certification elections infringe on Plaintiff's First Amendment rights, Defendant argues that they remain constitutional.

Defendant further argues that the standard ballot is rationally related to the government's interest in labor peace because it assists the government in determining whether a majority of employees want representation. Defendant asserts that, likewise, application of the majority rule is rationally related to a governmental interest because it helps identify the particular union favored by a majority of employees. Defendant contends that, even if the Court were to apply a more heightened analysis, the Board's election procedures are constitutional as they are narrowly tailored to the government's compelling interest and leave open ample alternative channels of communication.

C. Defendant-Intervenor ALPA's Argument[4]

Defendant-Intervenor argues that Plaintiff's Complaint must be dismissed because this Court lacks authority to review the NMB's certification of ALPA, which is a matter committed to the NMB's exclusive jurisdiction under Section 2, Ninth of the RLA, 45 U.S.C. section 152. Moreover, Defendant-Intervenor asserts that controlling precedent precludes Plaintiff's arguments against the NMB's long-approved balloting procedures since such procedures are within the Board's sole discretion under the RLA.

Defendant-Intervenor categorizes FEPNO's arguments as attempts to avoid the controlling force of precedent by asserting that its claims are distinguishable because they (a) involve constitutional violations and (b) are supported by the "scientific analysis" and "experimental evidence" set forth in the Crain Affidavit, which purports to show that the standard ballot procedure results in "bias" in favor of union representation and "perverse" election outcomes. Defendant-Intervenor argues that, even if Mr. Crain's theories and speculations had some academic or empirical merit (which Defendant-Intervenor contests), they do not begin to provide a legal basis for challenging ALPA's certification.

---

[4] Many of Defendant-Intervenor's arguments parallel those of Defendant NMB stated above and are thus, not repeated at great length below.

In regard to FEPNO's constitutional claims, Defendant-Intervenor contends that, given the wide statutory discretion conferred upon the Board by Congress, its administrative rules are entitled to the same "presumption" of constitutionality as are legislative actions. Due to the NMB's broad discretion in the context of representation disputes, Defendant-Intervenor asserts, employees have no constitutional right to insist that the Board resolve such disputes by any particular method.

I. Analysis of Plaintiff's Statutory Claims

Standard of Review

> Where the form of the election ballot used by the NMB and the NMB's duty to "investigate" representational disputes has been at issue, the Supreme Court has delineated the limits of jurisdiction to review such choices by the Board as follows: "[T]he selection of a ballot is a necessary incident of the Board's duty to resolve disputes. The Act expressly says as much, instructing the Board alone to establish the rules governing elections. Thus, it is clear that its decision on the matter is not subject to review where there is no showing that it has acted in excess of its statutory duty." Bhd. of Ry. & S.S. Clerks v. Ass'n for the Benefit of the Non-Contract Employees, 380 U.S. 650 (1965). To determine whether the Board has committed a gross violation of the Act, the Court may take a "peek at the merits." Professional Cabin Crew Ass'n v. NMB, 872 F.2d 456, 459 (D.C. Cir. 1989).

This Court concludes that the merits of Plaintiff's statutory claims have been previously decided by the District of Columbia Court of Appeals in Aeronautical Radio Inc. v. NMB.[5] Specifically, Plaintiff claims that the NMB's use of the standard ballot, its use of the "majority of the majority" rule, and the use of both procedures in combination, inter alia, violate sections 1a, 2, Fourth and 2, Ninth of the Railway Labor Act (RLA) and establish the NMB's

---

[5] 380 F.2d 624 (D.C. Cir. 1967).

failure to comply with its statutory duty to "investigate" a representational dispute so as to allow full and free expression of employee desires with regard to collective representation. This Court, guided by the reasoning and determinations of Aeronautical Radio, expressly rejects Plaintiff's claims.

In this case, as in Aeronautical Radio, the NMB held hearings and directed an election to be held for the purposes of deciding a representation dispute among the craft or class of employees of FEDEX. The ballots likewise listed the applicant representative (ALPA), the intervenor (USPA),[6] and provided write-in space for votes for any other organization or individual. The standard ballot did not have a space for a "no union" vote. Employees who wanted to vote against representation could simply not return ballots or return invalid ballots, which are counted against representation. The ballot also provided that "[n]o employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified."

As in Aeronautical Radio, the count taken after the election at FEDEX,[7] revealed that the applicant representative (ALPA) received the greatest number of pro-union votes among the craft or class of employees eligible to vote but did not receive the majority of votes from all eligible voters. By application of the majority of the majority rule, the NMB certified the ALPA as the collective bargaining representative of the FEDEX crew members.

In Aeronautical Radio, the employer (ARINC) argued, as does Plaintiff in this case, that the Board failed to perform its duty to investigate as required by section 2, Ninth, of the RLA. In both

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[6] Non-Party United States Pilots Association, Inc. (USPA), is the labor organization or union which unsuccessfully sought to be elected by "write-in" votes as the representative of the crew members of FEDEX in the election that resulted in certification of ALPA.

[7] The only election at issue in the FEDEX case is the "Second election," which was conducted subsequent to the dismissal of the results of the First election on grounds of unlawful carrier interference.

cases, the Board held an election, ascertained the results, and designated a bargaining representative. ARINC claimed, as does Plaintiff, that this investigation was deficient in that the results of the election would not permit a rational and non-arbitrary conclusion that the certified representative was the choice of the majority.

The Court in Aeronautical Radio stated that judicial review of employee representation proceedings is extremely limited.[8] The Court held that the Board did not act in excess of its delegated powers or contrary to a specific prohibition in the Act[9] given that, as in this case, more than a majority of the craft voted for union representation and, of those voting, a majority selected the applicant representative (ALPA). In the "context of all the factors" discussed, the investigation was held to be sufficient, for the details of selecting representatives are clearly left to the Board's final determination.

This Court is persuaded by the reasoning and determinations of the Court in Zantop Intern. Airlines v. NMB,[10] which presented facts similar to those in this case. In Zantop, the United Auto Workers Union (UAW) requested that the Board investigate the existence of an alleged representation dispute among the employer's flight crew members and determine their representative for collective bargaining purposes. As in this case, the NMB authorized a secret mail ballot election. The ballot used by the Board instructed voters that "[n]o employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified." Below this instruction appeared two boxes. Voters were directed to mark the first box to indicate a desire to be

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[8] (citing Switchmen's Union of North America v. NMB, 320 U.S. 297 (1943); Railway Clerks v. Employees Assn., 380 U.S. 650 (1965); Bro. of Ry. & S.S. Clerks, etc. v. NMB, 374 F.2d 269 (1966)).

[9] The Court noted that the Board was entitled to view the circumstances regarding certification of a representative in light of the practicalities of voting—many of those who favor representation will not vote.

[10] 732 F.2d 517 (6th Cir. 1984).

represented by the UAW. Voters who wished to be represented by "any other organization or individual" could write in the name of that organization or individual and mark the second box. The ballot did not contain a box for a "no union" vote.

The employer, like Plaintiff, petitioned the Board to deny certification on the ground that less than a majority of eligible employees in each group had voted for the UAW. In support of its petition, the employer, like Plaintiff, submitted affidavits of some employees stating that they were confused as to whether a ballot cast for a representative other than the UAW could be counted toward representation by the UAW. The employer's petition asked that the election be set aside because the Board had not clearly explained to voters how their votes would be considered in determining majority choice.

The Board denied the employer's petition and certified the UAW as representative of all flight crew members. In response, the employer alleged, as does Plaintiff, that the Board's certification of the union, absent election by a majority of eligible voters, violated the provision of Section 2, Fourth that "[t]he majority of any craft or class of employees shall have the right to determine who shall be [their] representative...." The employer also claimed, as does Plaintiff, that the certification violated Section 2, Ninth, which directs the Board to investigate a representation dispute and determine the collective bargaining representative.

The District Court in Zantop concluded that the Board had been granted discretion by Section 2, Ninth, to determine by any "appropriate method" who shall be the representative and that this discretion included the authority to reasonably construe the meaning of "majority" in Section 2, Fourth. The District Court also considered the discretion given to the Board by Section 2, Ninth, to conduct elections in the manner it deems proper as allowing the Board to choose not to inform voters of the precise procedure used to determine election results. Under these circumstances, the employer was found to have made no showing that the Board had acted in excess of its statutory authority or contrary to a specific

prohibition in the Act. Accordingly, the District Court held that it lacked jurisdiction to review the Board's certification of the UAW.

The Court of Appeals affirmed the District Court's ruling. On appeal, the employer had argued that the district court had jurisdiction because its action directly contravened an express statutory mandate favoring selection of a bargaining representative by a true majority of eligible voters. The employer alleged, as does Plaintiff, that it is a perversion of the intent of Congress to permit the Board to construct a majority by "borrowing" votes cast for one person or organization and adding them to votes cast for another to give that person or organization an "illusory" majority. Through the use of this "piggybacking" process, the employer contended, the Board acted in excess of its delegated powers.

The Court of Appeals concluded that the method of determining a majority was within the broad discretion granted to the Board.[11] The Court found the logic of this method easily discernable: in a case where several unions are competing to become the representative, to require one to receive a majority of all eligible votes would permit a minority to prevent any representation by abstaining or casting void ballots even though a majority of all eligible employees vote for some representation. Under the Board's method if a majority of the eligible voters want no representation they can achieve this by abstaining or casting void ballots. The Court concluded, as does this Court, that "[a]s a rule, we are not to look over the Board's shoulder in representational disputes. These matters are, apart from exceptional cases, solely the Board's concern."[12]

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[11] (citing Bhd. of Ry. & S.S. Clerks v. Ass'n for the Benefit of the Non-Contract Employees, 380 U.S. 650, 668-69 (1965); Switchmen's Union of N. America v. National Mediation Bd., 320 U.S. 297, 304 (1943); Aeronautical Radio, Inc. v. NMB, 380 F.2d 624 (D.C. Cir. 1967).

[12] Id. at 523.

II. Plaintiff's Constitutional Claims

Plaintiff claims that the contested NMB procedures violate the individual plaintiffs' freedom of association under the First Amendment. In examining the Plaintiff's argument, the Court notes that the Court in Virgin Atlantic Airways v. NMB,[13] expressly rejected such claims in a similar factual context.

In Virgin Atlantic, several employees joined their employer in objecting to the NMB's certification of the Teamsters Union as their employee representative. These individuals, like Plaintiff, argued that the NMB's certification action violated their First Amendment right of free association. They contended, as does Plaintiff, that the First Amendment guarantees them the right not to be represented by a group chosen by less than a majority of their co-workers.

The Court in Virgin Atlantic found that "[n]ot surprisingly, there is little support for [Plaintiffs'] proposition."[14] The Court stated that the "First Amendment right of free association has never been held to mandate 'majority rule' in the labor relations sphere".[15] The Court reasoned that, if the First Amendment did protect individuals from being represented by a group that they do not wish to have represent them, it is difficult to understand why that right would cease to exist when a majority of the workers elected the union.[16] Accordingly, the Court did not disturb the District Court's finding that the NMB's certification of the Teamsters did not violate the First Amendment rights of any individual employee.

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[13] 956 F.2d 1245 (2nd Cir. 1992).

[14] Id. at 1251.

[15] Id. at 1252.

[16] (citing, inter alia, Railway Employees' Department v. Hanson, 351 U.S. 225 (1956) (upholding union shop provisions of the RLA against First Amendment challenges).

Moreover, the Court has previously rejected First Amendment claims and Due Process claims brought by plaintiffs who were discontent with the NMB's certification de terminations. In Continental Airlines, Inc. v. NMB,[17] the Court held that, where air carriers have brought suit challenging the validity of the NMB's decision to transfer certification from one union to its successor following a merger of the two unions, the Board did not violate the plaintiffs' First Amendment rights, even though its decision was based on the results of a plurality vote in which the majority of eligible employees did not even participate. Finding similarly, no violation of plaintiffs' Due Process rights, the Court also dismissed the plaintiff's due process claim.

In Professional Cabin Crew Ass'n v. NMB,[18] where the NMB had dismissed a union's application for certification as the representative of flight attendants of an air carrier for lack of a majority showing of interest, the Court held, albeit in a footnote, that it "carefully considered [the union's] contention that the inclusion of the former strikers [as potentially eligible voters] violated the current worker's First Amendment ..." and found the argument "totally without merit and [needed to] spend no time refuting it." Utilizing the same reasoning, the Court also dismissed the plaintiffs' due process argument.

In Intern. Ass'n of Machinists v. Trans World Airways,[19] where an employer and some of its employees sought review of an NMB order to certify a particular bargaining representative, the Court held that the NMB's determination that certain airline employees who were temporarily working in another unit could not vote in the representation election for their unit did not violate those employee's constitutional rights.

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[17] 793 F. Supp. 330, 334 (D.C. D.C. 1991), aff'd in unpublished disposition, 957 F.2d 911 (D.C. Cir. 1992), 1992 WL 50390.

[18] 872 F.2d 456, 463 (D.C. Cir. 1989).

[19] 839 F.2d 809, 812 (D.C. Cir. 1988).

Notwithstanding the failure of Plaintiff to substantiate its claim that the NMB violated its freedom of contract, this Court, guided by the reasoning and decisions in Continental Airlines and Professional Cabin Crew—rejecting Due Process violation claims under similar factual circumstances—finds Plaintiff's claim to be without merit.

In Continental Airlines, Inc. v. NMB, the Court held that, where air carriers have brought suit challenging the validity of the NMB's decision to transfer certification from one union to its successor following a merger of the two unions, the Board did not violate the plaintiffs' rights under the Due Process Clause of the Fifth Amendment even though its decision was based on the results of a plurality vote in which the majority of eligible employees did not even participate.

In Professional Cabin Crew Ass'n v. NMB, where the NMB had dismissed a union's application for certification as the representative of flight attendants of an air carrier for lack of a majority showing of interest, the Court has held, albeit in a footnote, that it "carefully considered [the union's] contention that the inclusion of the former strikers [as potentially eligible voters] violated the current worker's ... due process rights" and found the argument "totally without merit and [needed to] spend no time refuting it."

Given the existence of applicable and/or analogous case law providing guidance as to the proper determination of this case, this Court concludes that, under a "peek at the merits" standard of review, it is neither required nor should it delve further into the issues and arguments presented by the Crain Affidavit in Support of Plaintiff. For the reasons stated herein, Defendant's Motion to Dismiss and Defendant-Intervenor's Motion to Dismiss are hereby granted.

/s/
Ricardo M. Urbina

APPENDIX D

ORDER OF THE

NATIONAL MEDIATION BOARD

DENYING MOTIONS FOR RECONSIDERATION

August 13, 1993

[20 NMB 659]
NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

[SEAL
OMITTED]

(202) 523-5920

August 13, 1993
20 NMB No. 106

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Re: NMB Case No. R-6044
Federal Express Corporation

Gentlemen:

The National Mediation Board has received Motions for Reconsideration of its June 14, 1993 "Findings Upon Investigation - Certification", in [660]Federal Express Corp., 20 NMB 486 (1993). In that decision, the Board determined that the Air Line Pilots Association (ALPA) and the United States Pilots Association (USPA) did not taint the laboratory conditions in the representation election in Case No. R-6044. Based upon the results of the January 14, 1993 ballot count, the Board certified ALPA as the representative of the craft or class of "Flight Deck Crew Members", employees of Federal Express Corporation (Federal Express).

The Federal Express Pilots for Non-Union Operation (FEPNO) filed a Motion for Reconsideration on June 24, 1993 and Federal Express filed a Motion for Reconsideration on June 25, 1993. ALPA filed a response to these motions on July 6, 1993. On July 12 and 13, 1993, respectively, Federal Express and FEPNO filed replies to ALPA's response. ALPA filed its surreply on July 20, 1993.

Section 15.0 of the Representation Manual governs the submission of Motions for Reconsideration:

> Motions for Reconsideration of Board decisions will be given consideration only upon the following circumstances: 1) the motion (original and 1 copy) is received by the NMB's Executive Director within 10 working days of the decision's date of issuance; 2) the motion is accompanied by a certificate of service which attests to its simultaneous service on the designated representatives in the proceeding; and 3) the motion states with particularity the points of law or fact which the movant believes the NMB has overlooked or misapplied and the detailed grounds for the relief sought. Upon consideration of a Motion for Reconsideration, the NMB will decline to grant the relief sought

> absent a demonstration of material error of law or fact or under circumstances in which the NMB's exercise of discretion to modify **[661]**the decision is important to the public interest. The mere reassertion of factual and legal arguments previously presented to the NMB generally will be insufficient to obtain relief.

The Board has considered the submissions and arguments of all participants in the above referenced case. After careful review, the Board finds that neither FEPNO nor Federal Express have shown any error of law or fact which would serve as a basis for the Board to reconsider its certification of ALPA.

I.

Both FEPNO and Federal Express argue that the Mediator's interviews with Federal Express pilots during the investigation of the allegations of election interference were insignificant in number and were conducted with biased union supporters. According to FEPNO, these circumstances resulted in a "skewed" investigation. Federal Express also claims that the Board's refusal to interview more than an "insubstantial" number of crewmembers was a "derogation of its statutory duty to investigate representation disputes."

These contentions do not "demonstrate a material error of law or fact" in the Board's determination. Furthermore, the contention that an "insignificant" number of pilots were interviewed is a "mere reassertion of...arguments previously presented" and was addressed by the Board in its June 14, 1993 determination (20 NMB 486, 500):

> The Board notes that it has reviewed hundreds of affidavits from Federal Express crewmembers in addition to conducting the on-site interviews and bases its findings on all the evidence in the record, not solely the interviews.

[662]FEPNO argues that since the Board was unable to make its determination on the basis of the written evidence submitted, the

crewmember interviews were essential to the resolution of the issues. FEPNO contends that this required the Board to conduct further interviews with " 'extreme impartiality, thoroughness and accuracy' " (citing NMB Representation Manual, §2.1, emphasis supplied by FEPNO).

The Board finds that the investigation in this case was conducted in accordance with the Board's standard practice and the procedures set out in the Board's Representation Manual. The Board notes that the Mediator's interviews were conducted in an attempt to clarify a specific issue, not because the Board was unable to make any determinations based on the written evidence submitted. The interviews were limited to this issue and, as with all issues before the Board, determinations were based on consideration of all the evidence.

Both FEPNO and Federal Express argue that the Board interviewed "biased" and "ardent" union supporters, rather than neutral, objective crewmembers. The Board notes that many Federal Express crewmembers were either supporters or detractors of the various unions in this case. In fact, although a majority of Federal Express crewmembers supported a union in the election, FEPNO alleges that 31.5% of those interviewed by the Mediator were union supporters. Since the Mediator chose crewmembers to be interviewed at random, the Board finds it not unusual or unexpected that a substantial percentage of those individuals might have supported one union or another.

II.

Federal Express also argues that the Board's October 19, 1992 determination "unlawfully chilled the First Amendment right of Federal Express to communicate its views to its employees and to respond to communications by ALPA and USPA during [663]the rerun campaign." The carrier cites a letter from Frederick Smith in which he "expressed concern about making lawful statements that could be construed by the Board as grounds for overturning an election" as "evidence of the chill." According to Federal Express, "Smith's letter establishes that the October 19 decision improperly

inhibited Federal Express from communicating with its pilots in a lawful, non-coercive manner."

As this argument does not involve the Board's June 14, 1993 determination the Board finds it untimely and not properly submitted for consideration under Section 15.0 of the Representation Manual. On these grounds, the Board dismisses Federal Express' argument.

Assuming, arguendo, that the contention was properly submitted for consideration, the Board has never stated that Federal Express or any carrier is precluded from communicating with its employees during a representation election campaign. The Board has permitted carriers to counter false or misleading union campaign communications, see, Zantop International Airlines, 6 NMB 834, 835 (1979), Pioneer Airways, 10 NMB 240, 241 (1983), USAir, 17 NMB 377, 419 (1990); and, to communicate their own internal policies regarding employment related issues, so long as these statements do not otherwise constitute interference, see, USAir/Shuttle, 20 NMB 162, 177-179 (1993). However, the Board has the duty, under Section 2, Ninth, of the Railway Labor Act, to "insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier." 45 U.S.C. §152, Ninth. In carrying out this duty, the Board considers both the totality of the circumstances and specific instances of interference to determine whether the laboratory conditions necessary for a fair election have been tainted.

Federal Express objects to the Board's October 19, 1992 determination that:

> **[664]**While each of the carrier's actions here, standing alone, may not have constituted interference per se, the pervasiveness of the carrier's campaign does concern us. Although the Board allows some involvement by carriers in representation matters, the carrier has a far more limited role in election campaigns than the organizations. That rule is more limited than the overall level of campaign activities taken by the carrier in the instant case.

Federal Express Corp., 20 NMB 7, 51 (1992).

The carrier contends that this finding constituted a "restriction[ ] on lawful communications in the second election [which] violated Federal Express' rights...." Federal Express apparently argues that the Board must find specific instances of per se interference on the part of the carrier in order to find that the laboratory conditions were tainted. Such an argument is inconsistent with the Board's policy of considering the facts and circumstances in their totality to determine whether the laboratory conditions have been tainted. See, USAir, 17 NMB 377 (1990). Merely because Federal Express has chosen to interpret the Board's policy such that it felt "inhibited" in the exercise of its own rights is neither grounds for the Board to reject its long-standing policy or to grant the relief requested by the carrier.

III.

Finally, Federal Express asserts that the Board violated its First Amendment and equal protection rights by:

> appl[ing] wholly inconsistent and irreconcilable standards for determining whether laboratory conditions have been destroyed based on whether the conduct that produced the same effect on employees **[665]**was engaged in by a union or a carrier. (Emphasis supplied).

Federal Express characterizes the Board's June 14, 1993 determination as holding that "an election will not be overturned on the basis of union interference absent proof of actual retaliation against an employee." (Emphasis in original). The carrier argues that the Board "found that ALPA actually made coercive statements" yet did not overturn the results of the election.

This argument is based on a misstatement of the Board's finding. Contrary to Federal Express' characterization, the Board found that the laboratory conditions were not tainted precisely because it found that ALPA's conduct was not coercive and therefore did not produce the same effect on employees:

> The Board considers the union campaign here to be appropriate, as opposed to the coercive nature which the same conduct would have when engaged in by a carrier.

Federal Express, 20 NMB at 535.

The Board has consistently held that coercive conduct by either carriers or unions may taint the laboratory conditions necessary for a fair election. However, the Board has recognized that the same conduct which is not coercive when engaged in by a union, can be coercive when engaged in by a carrier, due to the "unique power and authority which carriers possess in the workplace." Air Wisconsin, 16 NMB 235 (1989). Thus, Federal Express' attempt to raise the issue of a violation of constitutional rights as a result of the Board's June 14, 1993 "Findings" is without foundation.

Federal Express also purports to have uncovered "new evidence of a continuing pattern of conduct" on the part of ALPA, in the form of a "Scabs of Eastern" list which was sent to Federal Express [666]personnel responsible for pilot hiring. Since no list or evidence of this "pattern of conduct" has been provided, the Board views these assertions as unsubstantiated allegations which are not properly submitted for consideration.

As neither FEPNO nor Federal Express has stated a material error of law or fact upon which the Board relied in issuing its certification of ALPA, their Motions for Reconsideration are denied under Section 15.0 of the Board's Representation Manual.

By order of the NATIONAL MEDIATION BOARD.

/s/
William A. Gill, Jr.
Executive Director

APPENDIX E

FINDINGS UPON INVESTIGATION-CERTIFICATION

OF THE NATIONAL MEDIATION BOARD

June 14, 1993

[20 NMB 486]
NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

[SEAL OMITTED]

In the Matter of the Application of the AIR LINE PILOTS ASSOCIATION alleging a representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act, as amended involving employees of FEDERAL EXPRESS CORPORATION	20 NMB No. 86 CASE No. R-6044 FINDINGS UPON INVESTIGATION-CERTIFICATION June 14, 1993

On October 19, 1992, in Federal Express Corporation, 20 NMB 7, the National Mediation Board found that Federal Express had tainted the laboratory conditions in an election among the carrier's Flight Deck Crew Members. The Air Line Pilots Association (ALPA) had filed allegations of election interference which the Board investigated subsequent to the election.[1]

The Board ordered a re-run election using its standard ballot with ALPA on the ballot. Mediator Gale L. Oppenberg was assigned to continue the investigation.

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[1] The results of the ballot count, conducted on August 22, 1992, were that ALPA received votes from 1112 of the 2279 eligible voters. Five other valid votes were cast. The total valid votes, 1117, was 23 votes less than the majority needed for certification.

Ballots were scheduled to be mailed on December 3, 1992. On December 2, 1992, the Board received a Motion for Clarification or Reconsideration of the Board's decision in 20 NMB 7, filed by the Federal Express Pilots for a Non-Union Operation (FEPNO).

[487]FEPNO asserted that another organization, the United States Pilots Association (USPA) was conducting a campaign to collect write-in votes. FEPNO argued that since USPA was not a party in the original election "a re-run election which interjects third parties is not a re-run election...but...an altogether new election". FEPNO requested that the Board either use a ballot without a space for write in votes, or, if the Board used its standard ballot, the Board require that a majority of eligible employees cast votes for either ALPA or USPA in order for either organization to be certified. The Board denied the Motion on December 3, 1992, in 20 NMB 91.

The results of the ballot count conducted on January 14, 1993, were that ALPA received a total of 1015 valid votes out of a potential 2279 eligible voters. USPA received 271 valid votes. Under the Board's election procedures, this would result in a certification of ALPA as the representative of the craft or class.

However, on January 14, 1993, Federal Express filed "Objections to Certification of Election", alleging election interference by ALPA and USPA. On January 19, 1992, FEPNO filed "Objections to Certification of Election Due to Election Interference By Airline Pilots Association and United States Pilots Association". Federal Express and FEPNO filed supplements to their original objections on February 4 and February 5, respectively. USPA and ALPA filed responses on February 20 and February 22, respectively. Federal Express and FEPNO filed rebuttal briefs on March 4. USPA and ALPA responded with final submissions on March 9 and March 11, respectively.

On April 27 and 28, Mediator Oppenberg conducted interviews on the Federal Express property in Memphis, Tennessee, with a number of randomly selected Federal Express crewmembers.

[488]ISSUE

The issue before the Board is whether the laboratory conditions necessary for a fair election under the Railway Labor Act were tainted.[2]

CONTENTIONS

Federal Express' Position

Federal Express argues that both ALPA and USPA misrepresented the Railway Labor Act and the Board's voting and election processes, as well as carrier practices, policies and procedures. Federal Express asserts that union supporters engaged in illegal polling, coercion, interrogation and intimidation of employees in order to obtain their votes for union representation. Specifically, Federal Express contends:

1. ALPA misrepresented Board policy and procedure by failing to inform crewmembers of voting options, by asserting a Board finding of "coercive communications" against Federal Express, and by accusing Federal Express of attempting to interfere in the election;

2. USPA misled crewmembers by the use of the campaign slogan "A vote NO is a vote for ALPA", and by the distribution of a sample [489]ballot with instructions on executing a write-in vote for USPA;

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[2] FEPNO incorporates by reference the arguments raised in its previously filed Petition for Clarification or Reconsideration, as supplemented, in this proceeding. The Board has rendered its final decision with regard to the issue of the form of the ballot and voting procedures as established in 20 NMB 7. Only those issues which involve election interference or taint to the laboratory conditions are considered here.

3. ALPA misrepresented Federal Express' offer of an E-mail bulletin board and its efforts in advancing certain pension legislation, and intentionally undervalued the average career earnings and compensation of Federal Express crewmembers in election materials;

4. ALPA conducted telephone polling to coerce and intimidate crewmembers, giving the impression that retaliation for voting against ALPA was possible, and ALPA leaked false survey information to solicit votes for USPA, resulting in a majority vote for representation;

5. ALPA supporters systematically subjected employees to harassment and verbal abuse, threats, and coercion, and created a hostile and intimidating work environment by occupying the crew lounge and improperly bringing in nonemployee ALPA supporters to solicit Federal Express employees to vote for ALPA.

Federal Express argues that the evidence provided in supporting affidavits "provides a basis for setting aside the election." The carrier asserts that, should the Board find that more evidence is required for such a finding, it must conduct personal interviews with affiants and randomly selected crewmembers.

FEPNO's Position

FEPNO takes the same position as Federal Express. In addition, FEPNO contends that USPA was organized to [490]help ALPA by obtaining a majority vote in favor of some form of representation.

ALPA's Position

ALPA argues that none of its communications were misrepresentations and that, in any case, there is no evidence that the

communications influenced the election. ALPA also asserts the polling of voters was neither inherently illegal nor coercive, nor was it conducted in an intimidating or threatening manner. Finally, ALPA challenges individual accounts of threats or intimidation as vague and non-specific, and argues its conduct amounted to nothing more than "standard grass roots campaigning."

ALPA also argues that the standards applicable to carrier and union campaign conduct differ due to the carrier's greater power to coerce employees in an election. ALPA contends Federal Express has failed to show that any allegedly objectionable conduct had an actual impact on the outcome of the election.

USPA's Position

USPA responded only to those allegations which involve its conduct during the election period. USPA denies misleading employees with either its campaign slogan or its distribution of sample ballots. USPA also denies any complicity between it and ALPA.

FINDINGS OF LAW

Determination of the issues in this case is governed by the Railway Labor Act, as amended, 45 U.S.C. §151, et seq. Accordingly, the Board finds as follows:

I.

45 U.S.C. §151, First includes within the definition of a carrier "any company which is directly or indirectly owned or controlled by or under common control with any carrier." Federal Express Corporation has been found to be a common carrier as defined in 45 U.S.C. §151, First and §181 of the Act. Federal Express, 20 NMB 7 (1992), Federal Express, 17 [491]NMB 24 (1989), Federal Express/Flying Tiger, 16 NMB 433 (1989), Chicago Truck Drivers

v. NLRB, 599 F.2d 826, 101 LRRM 2624 (7th Cir. 1979); Federal Express, 6 NMB 442 (1978).[3]

II.

ALPA and USPA are labor organizations and representatives as provided by 45 U.S.C. §151, Sixth and §152, Ninth, of the Act.

III.

45 U.S.C. §152, Ninth, provides that the Board has the duty to investigate representation disputes and to designate who may participate as eligible voters in the event an election is required. In determining the choice of the majority of employees, the Board is "authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives...."

FINDINGS OF FACT

I.

Misrepresentations of the Railway Labor Act and NMB Rules and Procedures

A.

Federal Express asserts that ALPA misrepresented Board procedures when its "agent", the Federal Express [492]Pilots Organizing Committee (FEPOC), "failed to inform crewmembers on at least three occasions, of all the options available to ballot holders who wished no representation."

---

[3] The National Labor Relations Board (NLRB) has referred a jurisdictional question to the Board as to whether certain other Federal Express employees are subject to the Railway Labor Act. The finding in this case is made only with respect to the craft or class of Flight Deck Crew Members and does not include employees involved in the matter pending before the NLRB.

In support of this contention, the carrier has provided transcripts of several FEPOC telephone "Hotline" recorded messages. The "Hotline" message of December 30, 1992 contains the following passage concerning voting and ballot handling:

> Finally, please remember that your opinion won't be heard of (sic) your ballot doesn't reach Washington in a timely manner. You matter in this election. Be part of the process. Don't let your ballot just sit on your desk. Vote for ALPA or USPA or tear up your ballot if that is your decision. But make a decision, don't just sit this one out. Your opinion counts.

The transcript of the January 4, 1993 telephone "Hotline" message reads, in part:

> Vote now. We hope you will vote for ALPA, but whatever your choice make a commitment to participate in this process. Vote for ALPA or vote for USPA or tear up your ballot but don't just sit this election out by doing nothing. Your opinion counts too much in this process. We encourage you to step up to the plate and take responsibility for your career.

The transcript of the January 5, 1993 telephone "Hotline" includes the following:

> This election is drawing to a close. If you haven't made a decision you'll be leaving this important career decision for others to make for you. Don't let that happen. We certainly hope that you will vote for ALPA but whatever your choice we encourage you to make a definite decision and act on it now. Vote for ALPA or for USPA or tear up your ballot if you must.

[493]ALPA argues, in response, that crewmembers were fully aware of their options. ALPA points out that campaign literature, videotapes and billboards, as well as sample NMB ballots and the NMB's "detailed instructions" distributed with ballots have

ensured that crewmembers understood voting options and procedures.

B.

Federal Express argues that ALPA deliberately misrepresented the Board's decision in 20 NMB 7 (1992) (in which the Board found Federal Express tainted the laboratory conditions in the election held August 22, 1991) by claiming the Board had cited Federal Express for "coercive communications." Federal Express asserts that no finding of "coercive communications" was made by the Board.

In support of this contention, the carrier has submitted a transcript of the FEPOC "Hotline" message for October 20, 1992, which contains the following passage:

> Yesterday the National Mediation Board announced their decision regarding our protest of the 1991 representation election results. In a clear victory for Federal Express Pilots, the Board agreed with our basic contention that Federal Express Management had interfered with our rights to an unencumbered decision regarding legal representation. In doing so, FedEx Management tainted the laboratory conditions that must prevail during such elections. While the Board did not agree with all of the points that were presented in our Organizing Committee's protest, they did specify those aspects of Management's behavior that tainted last year's election.
>
> 1. Statements by managers in the early part of last year's campaign led to furlough rumors.
>
> 2. The Company misrepresented dues obligations by former ALPA Members stating [494]that back dues would be owed for interim periods.
>
> 3. The formation of the SCOPE Committee during a crucial point in the campaign was designed to entice

pilots away from seeking legal representation to protect that aspect of their careers.

> Beyond these specific points, the NMB found that the Company's pervasive and sustained anti-union posture coupled with overwhelming press and video campaign 'overwhelms an employee's right to select or not to select a Collective Bargaining Representative without carrier interference or influence.'

Federal Express argues that the October 20 "Hotline" message demonstrates that ALPA understood the Board's ruling. The carrier maintains that ALPA subsequently misrepresented the ruling by including the "coercive communications" language in its November 12 press release.

ALPA News' Press Release # 92.47, dated November 12, 1992, contains the following passage:

> In ordering the re-run election, the NMB stated that Federal Express management activities, including the spreading of furlough threats, misrepresentations, and other coercive communications, tainted the laboratory conditions which are required by federal law to ensure fair elections.

ALPA responds that its "paraphrasing" was a "fair and accurate" representation of the Board's finding.

C.

Federal Express contends ALPA misrepresented the Railway Labor Act in its response to the carrier's invitation to debate election issues. The carrier asserts that ALPA president J. Randolph Babbitt accused the carrier's CEO, Frederick Smith, of "attempting to violate the NMB rules and processes" [495]and "'contaminating the election process' by even suggesting the debate."

To support this assertion, the carrier has provided copies of correspondence between Federal Express and ALPA. All correspondence was distributed to crewmembers at the time.

In a letter dated November 9, 1992, and addressed to Babbitt and Mark Estabrook (identified as the Interim Chairman of the USPA Organizing Committee), Smith wrote, in part:

> ...I am sure you will both agree with me that the decision now facing our crewmembers again is one of the most important of their aviation careers. That being the case, I feel obligated to make every effort to ensure that each crewmember makes his or her decision with eyes wide open and with all facts at his or her disposal. For that purpose only, I invite you to join me in a series of three debates.
>
> These debates will provide each of us with the opportunity to explain the advantages of the system we each hope our pilots will ultimately embrace. The debate format will provide pilots with the opportunity to ask us pertinent questions in order to finally lay to rest any misconceptions or lingering doubts as to which system they prefer to work under.
>
> As you well know, there are constraints on what company officials can say during a representation election. At the same time I would like to ensure that the debates are more meaningful to our pilots than they are to the lawyers. In that regard, I ask that you each join me in an agreement that none of us will use what [496]is said in these debates as a basis for interference charges at any time before or after the election. Such an agreement will allow us to give direct answers to the questions the pilots want answered.

In his response declining this invitation, Babbitt addressed a letter to Smith, dated November 12, 1992, which contained the following comments:

I'll admit that the opportunity to debate you on the issues you've defined appears attractive at first glance, but the fact is that the issues you've defined are simply not the issues of this election. In fact, your inserting yourself in the campaign in an attempt to define the issues makes a mockery of the election process.

Contrary to your letter, the purpose of the election is for Federal Express pilots (and not Federal Express management) to decide the best means for representing their career interests within the company, and in pursuit of company goals. Pilots have waited for 14 months to reach the point where they might make that decision free of company interference. I am disappointed to discover that you evidently are unwilling to offer them that opportunity. I am concerned that your "invitation to debate" is no more than another attempt to insert yourself into the campaign — not only as an active participant, but as an overseer of the process. The NMB has previously criticized your personal involvement in the election process, expressing concern that it was "a reminder of the 'power and authority'" which you exercise.

I'm disturbed as well by the fact that you propose to suspend the legal process by calling for a waiver of objections to carrier interference during the proposed debates.

[497]The rules against carrier interference are designed to protect the pilot's right of free choices. It seems to me that one would only find it necessary to suspend the rules if he intended to violate them by attempting, once again, to interfere with the pilots' decision-making process — and that is exactly the message your proposal sends. This proposal suggests an extraordinary disdain for the rights of the pilots, for a valid process overseen by the NMB, and for the Board's decision ordering a re-run election.

* * *

> With these thoughts in mind, I regard your debate proposal as inappropriate to the point of contaminating the election process. (Emphasis in original)

In its January 14, 1993 submission, Federal Express argues that "in order to justify his refusal to debate" and "[b]y distorting and twisting the Board's rerun decision, its policies, and the law for benefit of the ALPA campaign, Babbitt's actions constituted interference with the Board's process and procedures."

ALPA defends its conduct on grounds that its FEPOC supporters reasonably believed that Federal Express' "tactics and proposed debate rules constituted unlawful interference." FEPOC Chairman Eric Vartanian provided an affidavit in which he states that ALPA supporters believed Smith's invitation was a "ploy designed to pressure ALPA" into allowing an expansion of the carrier's role in the election, in violation of the Railway Labor Act and NMB election policies.

[498]II.

Voter Confusion as a Result of USPA's Campaign

A.

Federal Express asserts that USPA misrepresented the effect of voting options by claiming that "A vote NO is a vote for ALPA". The carrier argues that, by the continued use of this slogan, USPA misled voters regarding their voting rights and the option of voting against representation. The carrier contends that:

> By posturing itself as the only alternative to ALPA representation, the USPA subverted the no representation option available to Federal Express crewmembers. In its wave of misrepresentations aimed at convincing, confusing and ultimately deceiving crewmembers about their repre-

sentation choices, USPA collected votes from crewmembers who did not want representation at all. (Emphasis in original)

In support of its contention, the carrier has provided documents in which USPA used this slogan in various forms. A letter dated November 3, 1992, addressed to "Fellow Pilots" (at Federal Express), reads, in part:

2. Is a vote for USPA a vote for ALPA? No. According to NMB rules, if the majority of pilots votes for union representation, then the union that receives the majority of votes cast becomes the representative for the pilots.

3. What if I vote "NO" again? Given the closeness in the last election, we feel the option of two unions makes representation inevitable. **To vote NO at this point is in fact a vote for ALPA!** The choice is yours. (Emphasis in original)

[499]A letter from USPA dated December 10, 1992, also addressed to "Fellow Pilots", contains "Twelve Undeniable Truths of Life for Fed Ex Pilots." Number 12, the only item making reference to the "No" vote issue, states:

12. To vote "NO" at this time, will ensure that the Air Line Pilots Association is certified as our bargaining agent.

In its submission of January 14, 1992, Federal Express stated:

The carrier will be seeking affidavits from confused crewmembers who voted for USPA because of these misrepresentations and will present them to the Board in its supplemental filing.

The carrier provided affidavits regarding voter confusion about election procedures and options. Several affiants asserted they were

aware of other crewmembers who had been confused by the USPA slogan and campaign rhetoric. One affiant stated:

> I feel that the union election for pilots at Federal Express was extremely confusing, and the information put out by both ALPA and USPA directly caused this confusion. Many crewmembers that I flew with during the vote expressed this to me, and were under totally mistaken assumptions as to how their vote would be counted.

Another affiant stated that USPA's campaign "created an atmosphere of heightened tension and confusion." The affiant adds, though, that "I did not vote for ALPA or USPA. I do not want any organized group representing me."

Federal Express has provided only one affidavit from a crewmember who stated that he or she was confused or misled by campaign slogans or rhetoric, and as a result voted for USPA "because I felt that was the only alternative to ALPA."

[500]B.

Mediator Oppenberg conducted an investigation of the allegation that voters were confused about voting options. Randomly selected crewmembers were asked, among other things, the following questions:[4]

1. Were you confused about voting options?

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[4] Federal Express has communicated to the Board its concern that the number of crewmembers interviewed (19) is "statistically insignificant." An examination of the Board's past investigations, including the investigation previously conducted in this case (Federal Express, 20 NMB 7), reveals that the number of randomly selected employees interviewed in this instance is comparable and conforms to the Board's standard practices. The Board notes that it has reviewed hundreds of affidavits from Federal Express crewmembers in addition to conducting the on-site interviews and bases its findings on all the evidence in the record, not solely the interviews.

2. Did you understand how to vote against representation?

3. Did you understand that if you did not return the ballot it would be counted as a "No" vote?

If an individual stated he or she was confused, the Mediator asked additional questions to determine the nature and source of their confusion. Several crewmembers stated that they were uncertain as to whether voting for USPA or not voting was the most effective means of defeating ALPA. One individual stated:

> ...I was confused about whether the most effective way to keep ALPA out was to vote "No" as I preferred, or vote for USPA as the lesser of two evils. I understood mechanically how to vote "No". I was confused whether it would be effective [501]given the combination of potential votes for ALPA & USPA. I understood votes for USPA & ALPA would be combined as being votes for representation & I didn't think that was fair.

Only one individual responded that he or she did not understand how to vote against representation. However, further inquiry revealed that the individual understood how to vote against representation, but was uncertain about the ultimate effect of such a vote. The individual stated, "I would have preferred an independent, but I felt a vote for the independent would be a vote for ALPA."

The vast majority of crewmembers interviewed were not confused about voting options or how to vote for or against representation or how the NMB would count their vote. All crewmembers interviewed indicated their understanding that failure to return a ballot would be counted as a vote against representation.

C.

FEPNO also asserts that USPA's campaign slogan confused voters:

> USPA's misrepresentation that it was the only alternative to ALPA and that a "no" vote was effectively a vote for ALPA, so confused and frustrated the Crew Members' understanding as to the NMB's policies and procedures for a free and fair election, that the Crew Members' freedom of choice was effectively taken away, as is evidenced by affidavits and statements attached...

FEPNO provided 32 affidavits from crewmembers who, FEPNO asserts, were confused about voting options and therefore did not vote. Affiants stated that confusion resulted from the entry of USPA into the campaign and USPA tactics. An examination of these affidavits reveals that some affiants stated they were confused for some period of time. However, these individuals admitted that by the time they made their voting decision they were no longer confused. 11 of [502]the 32 affiants made no reference to any confusion at all. Only one affiant stated that his or her confusion persisted throughout the voting period, resulting in the affiant not voting.

Ten affidavits were submitted from crewmembers who, according to FEPNO, voted for USPA due to confusion and misunderstanding. Seven of these individuals submitted identical form affidavits in which they state disagreement with NMB election procedures and policies. None of these seven affiants state that either ALPA or USPA misled or confused them. Only one individual stated that the USPA slogan "had a great deal of influence on" the decision to vote for USPA.[5]

FEPNO provided statements from four individuals who signed identical form affidavits stating:

> I voted for USPA in the...election. I feel that the election structure was fundamentally flawed....I am opposed to

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[5] This individual also submitted a similar affidavit on behalf of Federal Express, as discussed on page 499.

> union representation for the pilots at Federal Express. I voted for USPA as the lesser of two evils in an effort to stop ALPA. If the election were conducted with ALPA being the only choice, I would not have returned a ballot (would not have voted for representation).

Eight other affiants also stated that they thought the election structure "fundamentally flawed." However, according to their statements, these individuals voted for USPA because they desired representation by USPA.

D.

Mark Estabrook, current interim secretary of USPA and Gary Lovan, USPA's president, provided affidavits to the Board in which they denied Federal Express' assertions. For its part, USPA argues the slogan was [503]not "aimed at convincing individuals they could not vote no; rather, it was aimed at convincing pilots as to what the practical effect of that vote would be."

E.

Federal Express also asserts that USPA deceived crewmembers by distributing on two occasions a sample NMB ballot with instructions for executing a write-in vote for USPA. The carrier contends that "USPA's altered ballot appeared 'official' and its distribution was combined with misrepresentations of the Board voting process." Federal Express argues that this resulted in crewmembers voting for USPA due to confusion about their voting options.

The carrier has submitted a copy of the sample ballot which USPA distributed to Federal Express crewmembers. The ballot is marked "SAMPLE" along the right margin and the word "VOID" is printed in the space which identifies the NMB case number. The name "UNITED STATES PILOTS ASSOCIATION" is hand written in space reserved for "ANY OTHER ORGANIZATION OR INDIVIDUAL". An "X" is marked in the voting square and

directions are printed in the bottom margin, with an arrow pointing to the write-in space:

> WHEN YOUR BALLOT ARRIVES IN THE MAIL...PRINT "UNITED STATES PILOTS ASSOCIATION" ON THIS LINE. DO NOT MAKE ANY STRAY MARKS. MARK AN "X" IN THE SQUARE BELOW.

USPA defends its distribution of the sample ballot as intended to "familiarize pilots with the availability of the write-in option." The organization also states that:

> Neither the Carrier nor FEPNO has submitted a single declaration or affidavit demonstrating that the sample ballot circulated by USPA was perceived as an NMB endorsement of USPA's campaign.

F.

FEPNO contends USPA was organized by ALPA representatives in order to collect enough votes from [504]anti-ALPA voters to reach a majority vote for some form of representation, which would allow ALPA to become the certified representative. FEPNO asserts that crewmembers "believe there is a close connection and complicity between ALPA and USPA..."

FEPNO provided 23 affidavits from crewmembers in support of this contention. Only one of these 23 actually claimed any personal knowledge of circumstances:

> I know personally from many phone calls from [named] members of the USPA organizing committee, that they KNEW from the very beginning that they could not win this election. This was stated to me on multiple occasions in an effort to entice the NO group to join with USPA to defeat ALPA. If they knew they could not win, it is apparent that USPA's drive was a sham from its inception to the final count. Through inside sources we have strong reason to suspect that their leadership was covertly aligned

with ALPA in an effort to split the vote so as to give ALPA the advantage and emerge the victors.

No evidence to substantiate the allegations was provided by the carrier or FEPNO.

Both ALPA and USPA deny the allegations of complicity. ALPA maintains that the "two groups competed against each other, and at times criticized one another." USPA argues that these allegations are "belied by the intense rivalry that arose between USPA and ALPA during the election period."

In support of its contentions, USPA provided the Board with copies of its constitution and by-laws, and a copy of their December 2, 1992 letter to crewmembers in which the constitution and by-laws of USPA are favorably compared to those of ALPA. In addition, USPA provided copies of documents in which ALPA and FEPOC criticized the USPA organization.

[505]II.

Misrepresentations of Carrier Practices and Policies

A.

Federal Express maintains that ALPA deliberately misrepresented the carrier's policy concerning the establishment of an electronic mail (E-mail) bulletin board for campaign communications.

Federal Express asserts that it offered ALPA, USPA, FEPNO, and the individual pilots the use of the E-mail bulletin board in lieu of permitting campaign messages to appear on individual employee's E-mail screen because these screens were reserved for business communications and, "[t]he company was also motivated by maintaining certain levels of privacy for employees in their personal E-mail files."

On July 22, 1992, the carrier's Senior Vice President for Air Operations, Theodore L. Weise, forwarded a letter to FEPOC and FEPNO stating Federal Express' policy concerning the distribution of campaign literature via the E-mail system, which reads, in part:

> I am writing to all the involved groups asking that everyone refrain from using distribution lists to send campaign messages that show up as an individual message to the pilot from the sender. Instead, and as an alternative accommodation to all of you, I am having our Email support group look into creating a campaign bulletin board so all interested parties and individuals desiring to express views on the union issue through Email can do so on that bulletin board.
>
> * * *
>
> I am asking each of you and your committee members not to create distribution lists in Email to send out [506]campaign correspondence to fellow crewmembers. There are already numerous other ways to communicate your views to the pilots and I expect everyone to use those traditional methods until an Email campaign bulletin board can be set up. Once the Email campaign bulletin board is established, you will be informed of the procedures and how they will be applied to the campaign bulletin board. Needless to say, upon conclusion of the campaign, the Email campaign bulletin board will be discontinued.

In a memorandum to crewmembers, dated November 3, 1992, Weise described the procedures for accessing this bulletin board and noted:

> Granting this E-mail access to the groups and crewmembers is done to promote an open forum for pilots to discuss the representation issue. However, please be aware that Federal Express will not tolerate the use of profanity or vulgarity by any group or individual. If profanity or vulgarity appears on any screen, Federal

> Express reserves the right to delete and discipline the crewmember or group who engages in this type of conduct.
>
> Additionally, the individual groups mentioned above will have their own identification access and a password for exclusive entry into their bulletin boards. This design is to ensure that no one gains access to these boards to erase or sabotage their efforts during the campaign.

Federal Express provided a transcript of the FEPOC telephone "Hotline" message of November 14, 1992, which, the carrier argues, constitutes a misrepresentation of Weise's remarks. It includes the following passage:

> [507]It was a refinement of the Email campaign bulletin board where the company offered the [forum] in order to monitor and control the discussion.

Federal Express asserts ALPA was aware this charge was false but deliberately created the opportunity to disparage Federal Express management and misrepresent Federal Express practices.

Based on the affidavit of Eric Vartanian, ALPA responds that "[i]t was reasonable to believe that Fed Ex had the capacity to determine whether individual pilots were accessing particular messages.... The Organizing Committee believed that Fed Ex's justification for creating the bulletin board was pretextual and had no basis in fact."

B.

Federal Express also alleges that ALPA "fabricated a statement about the Company's intentions" in pursuing pension legislation. Federal Express provided a transcript of the FEPOC "Hotline" telephone message of November 5, 1992:

> Yesterday President Bush vetoed the HR-11 that contained the so-called Federal Express Pilot's Provision

> of the Pension Simplification Legislation. The issue is, therefore, dead for the time being. Regardless of your opinions on the issue, however, all the other stateside employees of Federal Express are probably rejoicing now since their retirement remains tied to ours. That is, their retirement is predicated on age 60. Had the bill and the special provisions passed, the Company would have had the opportunity to leave our Pilots' Retirement unchanged and to extend all other employees' retirement age beyond 60 thereby reaping tremendous actuarial benefits.

[508]Ann S. Dickey, Federal Express' Managing Director of Government Affairs, has submitted an affidavit which states, in part:

> Federal has pursued legislative pension relief for our pilots for one reason only — fairness. Federal does not believe that it is fair that unionized pilots should enjoy a level of benefits legally unavailable to pilots who have chosen to remain nonunion. The statement that ALPA made on November 5, 1992 had absolutely no basis in fact and was designed to derogate and completely misrepresent the Company's efforts concerning this legislation.

ALPA denies the allegation of "fabricating" a statement about Federal Express' intentions. "ALPA did not say that Fed Ex would or intended to leave benefits unchanged, just that it could do so."

C.

Federal Express also alleges that ALPA misrepresented the career earnings and compensation of Federal Express crewmembers as compared to crewmembers at other airlines. Federal Express asserts that "ALPA literature bases its assumptions on false potential career earnings...and fails to mention recent contract concessions at [other airlines]." The carrier argues that the "independent" expert who conducted the research was employed "to enhance and overstate pilot pay and benefit levels at unionized carriers while simultaneously misrepresenting, minimizing, discounting, or

completely ignoring comparable Federal Express pay, benefits, and work rules."

Federal Express has submitted a reproduction of the January 6, 1993 issue of "Final Approach" (published by ALPA and FEPOC), which contained comparisons of pay and benefits of Federal Express pilots and pilots of other airlines, including graphs comparing career earnings, retirement benefits, and "A" and "B" pension plans. The publication bases much of its information on a report by Kit Darby of Air, Inc., who is identified as an "independent industry [509]analyst." Representative of the assertions made throughout the report are the following claims:

> The disconcerting truth is that, during his or her career, the average FedEx pilot will earn up to $4 million less that pilots at the top of the industry -- $ 2.3 million less than the average, and over $ 1 million less than UPS pilots.
>
> * * *
>
> To put it in the simplest of terms, OUR FEDEX RETIREMENT PLAN IS WELL BELOW YOUR PROFESSIONAL WORTH AND AIRLINE PILOT INDUSTRY STANDARDS.
>
> * * *
>
> Incredibly, there is a $4.25 million difference between career earnings of a United and a FedEx pilot using the equitable assumptions of the study.... United's B-plan accounts for $2.4 million of this difference alone, which negates any claims of assumption variations that might otherwise skew the findings. Our only excuse for a B-plan revolves around profit sharing (which continues devoid of corporate cash contributions) and the 401(k), which provides a whopping $250 maximum yearly corporate contribution.

> This is yet another example of an outside, independent source finding that FedEx pilots lag far behind industry standards in both retirement and compensation.

Federal Express provided two affidavits alleging misrepresentations in the Air, Inc. study. August C. Lauer, Senior Manager of Employee Benefits, stated the following in his affidavit:

> Mr. Darby's report assumed no contributions by Federal in a B-Plan. The report failed to note that Federal Express [510]contributes to a Profit Sharing Plan, a version of a B-Plan. Mr. Darby's assumption therefore misrepresents the retirement benefits of Federal Express pilots in comparison to pilots of other major airlines.
>
> Mr. Darby's report also assumed the worth of Federal Express pilots' retirement plan to be 7.5% of their total earnings. This is a misrepresentation. The records will show that our retirement plans have been worth 11.6% at Federal Express for the past 15 years.

William J. Cahill, Managing Director of Compensation, also submitted an affidavit, which states:

> Mr. Darby's report assumed an 80-hour average of flying each month. This "average" totally ignores the fact that Federal Express' work rules are in many instances more generous than other major airlines. The records will show that at Federal Express, it is the rule, rather than the exception, to be credited with greater than 90 CH for a month of BLG flying. Mr. Darby's flawed assumption misrepresents the potential career earnings of Federal Express pilots. This misrepresentation slights Federal Express pilots' career earnings by 15% or more.
>
> Mr. Darby's assumption regarding the length of time it takes to make widebody captain (i.e., 21 years) is also a misrepresentation. A review of the historical career progression at Federal will show that Federal's most

junior widebody Captain (MD-11) reached that position in about 9 years. Federal's most junior DC-10 captain reached that position in 12 years.

Mr. Darby's report assumes that the average pilot will spend 10 years as a [511]widebody (senior) captain. Based on Federal's historical experience, some pilots may spend 25-30 years as widebody captains. This assumption misrepresents the potential career earnings of Federal Express' pilots.

Mr. Darby's report does not take into consideration the recent contract concession limitations at Delta, Northwest, United and USAir; therefore, it significantly misrepresents the job security and potential career earnings of those pilots.

ALPA maintains that Federal Express' criticisms are "completely without merit." ALPA argues that the report was an accurate comparison based on accepted methodology and conservative assumptions and that it "contains a full explanation of all underlying assumptions" which allowed pilots "the full opportunity to hear both sides and judge for themselves."

IV.

Illegal Polling

A.

Federal Express contends ALPA engaged in illegal telephone polling of crewmembers "for the purpose of determining if they voted in this election." The carrier asserts ALPA hired the Wilson Center for Public Research to conduct a survey "to identify who had voted in the election, and for those who had returned a ballot, how they had voted." The carrier also maintains that, after the Wilson Center "interrogated" crewmembers, an ALPA or FEPOC representative would "follow[ ] up with a second or third call."

According to Federal Express, "ALPA gave all crewmembers the unmistakable impression that a list of all employees and how they voted in the election was being maintained." The carrier argues that because ALPA holds itself out as having a great deal of power, [512]"comparable to that of a carrier", and because of ALPA's reputation for its ability to retaliate against employees, this type of interrogation should be found to be a per se violation of the RLA:

> ALPA's interrogation of employees regarding their vote is inherently coercive because it raises the specter of future retaliation, allows direct pressure to be applied against crewmembers who do not wish to be represented by a union, and destroys the basic concept of a secret ballot election.

FEPNO also alleges that the polling by ALPA and the Wilson Center was illegal and constituted interference in the election. FEPNO claims that ALPA used Wilson "to interview Crew Members to determine their views on representation, so that Crew Members who did not vote or were not going to vote could be targeted for coercion, harassment and intimidation into voting for ALPA by ALPA representatives." FEPNO asserts these actions were "directly contrary to the secret ballot procedures of the NMB."

Both Federal Express and FEPNO submitted affidavits from crewmembers in support of their contentions. The affidavits provided by Federal Express allege specific instances of polling by ALPA and Wilson Research, including questioning crewmembers as to whether they received and/or returned a ballot, how crewmembers voted or intended to vote, and questioning of crewmembers' wives. Federal Express alleges, "[a]fter Wilson contacted a crewmember, an ALPA representative — usually a member of the organizing committee — followed up with a second or third call." Federal Express argues that such conduct constituted intimidation and harassment:

> When ALPA and Wilson called, they identified the individuals by name; thus, impressing on the crewmember that the "survey" was not confidential. The lack of privacy was reinforced when the call from Wilson was immediately followed by a call directly from the organizing committee.... Many affiants stated the totality of ALPA's [513]conduct resulted in crewmembers being intimidated and harassed.

In the affidavits provided by Federal Express several crewmembers stated that they felt threatened or intimidated by the polling. Many also asserted their "belief" that their privacy had been invaded and that ALPA had harassed them and their families. Several crewmembers stated their "belief" that the polling was an attempt to coerce votes for ALPA, and that their right to a secret ballot was violated. Several affiants also stated that they responded to the polling by refusing to answer questions and by informing the caller of the private nature of their voting decision.

One affidavit provided by Federal Express contains allegations of numerous instances where a crewmember and his wife were contacted by telephone and questioned regarding the crewmember's voting position. It reads, in part:

> Several days later, I received a call from yet another person who identified himself as a member of the Organizing Committee. The Committee member asked me to reveal how I had voted. I informed the Committee member that this was a secret ballot and that I considered it a private matter. The conversation ended there, and I received no further calls. I felt that the Organizing Committee was interrogating me regarding my views involving the union election. I further felt that the Organizing Committee invaded my privacy and right to a secret ballot.

Another affiant alleges several instances of telephone polling, among them the following:

Sometime before January 14, 1993, I received a call from a woman who identified herself as an individual conducting a poll for ALPA. The poll consisted of the following questions (paraphrased):

[514]a. Did you receive your ballot?
b. Did you send in your ballot?
c. Would you mind if someone from ALPA called you to discuss the issues?

I resented being asked whether I had mailed in my ballot since the question was obviously intended to determine whether I favored union representation. I answered affirmatively about receiving my ballot; however, I told the caller that it was none of her business whether I had mailed in my ballot. I also told her that her questionnaire was biased. The remainder of my conversation with the above referenced caller was elusive so as not to indicate whether I favored union representation or not since I didn't know what use would be made of my responses.

The affiant describes subsequent calls from fellow crewmembers inquiring into the affiant's voting intentions, stating: "I believe that the multiple calls were intended to coerce me into voting for union representation, since I had not told any of the callers whether I would send in my ballot."

B.

FEPNO provided 65 affidavits which are identical in form, containing two assertions:

#1. I received a telephone call from a representative from the Wilson Research Center who asked me questions concerning the election. This included specific questions on the disposition of my ballot.

#2. I received a telephone call from a representative from the ALPA Organizing Committee who asked me questions concerning the election. This included specific questions on the disposition of my ballot.

[515]Following these assertions is a general statement of the affiant to the effect: "I found this/these call(s) to be intimidating and an invasion of my right to cast a secret ballot." Affiants were able to signify agreement with one or both assertions. Several affiants called by Wilson noted that they hung up after being informed of the caller's identification with the FEPOC or ALPA. One affiant who was contacted by Wilson noted:

> I should have hung up, but I answered the questions — I made it known that I was anti-ALPA — then I thought — Have I just hung myself? If ALPA wins they know all the pilots who are anti-ALPA. [That] could make it rough on us.

Another affiant who was contacted by Wilson Research crossed out language that he or she found that call(s) intimidating, although the affiant retained the assertion that the call(s) were an invasion of the right to cast a secret ballot. One crewmember who agreed with both assertions also included comments separately:

> I have been repeatedly harassed by members of the ALPA Organizing Committee through phone calls inquiring about my personal, political views. I also have reason to believe these people had priviledged (sic) information regarding the status of my ballot.

FEPNO has also provided many individual affidavits submitted by crewmembers which allege polling by ALPA and Wilson. One of these affiants related a conversation he had heard concerning the polling:

> While at work one morning in the week prior to the ballet (sic) count, I was reading FCIFs in the crew lounge.

> [A FEPOC member], was standing beside me discussing the campaign with another crewmember. I heard [this FEPOC member] tell this individual that the Wilson Center was providing the FEPOC names of the [516] individuals who, when polled, gave answers that were "wishy washy", i.e. indecisive or lacking resolve in their voting position. The committee (FEPOC) was then calling these individuals to convince them to vote for the ALPA. This, of course, is paraphrased — but is an accurate description of the context of the conversation.

C.

Polling by the Wilson Center

In response to the carrier's and FEPNO's submissions on this issue ALPA has provided an affidavit from Philip Comstock, Executive Director of the Wilson Center for Public Research, Inc. Comstock's affidavit describes the organization and the actual polling done on behalf of ALPA among Federal Express flight deck crew members.

According to Comstock, the Wilson Center is a "not-for profit corporation with the support of organized labor to serve the interests of unions in the United States and Canada." Wilson's work largely consists of conducting telephone polls commissioned by labor unions. It has conducted polling during organizing and election campaigns and prior to major negotiations, for the purposes of determining union members' political views and voting behavior and their views of regulatory and legislative issues, and to aid in determining the appropriate means to further boycott activities and encourage union label purchasing. Comstock also refers to several other firms which "have also conducted polls on behalf of unions during the course of union organizing and election campaigns."

Wilson was retained by ALPA during the re-run election campaign to conduct pilot polling. The polling took place in three phases. Phase one occurred between November 14 and November 23, 1992; phase two, on December 19 and 20, 1992; and, in phase

[517]three, Wilson conducted interviews with pilots between December 28, 1992 and January 10, 1993. The Board mailed ballots to crewmembers on December 3, 1992, and the ballots were counted on January 14, 1993.

According to Comstock, during the phase one polling in which Wilson interviewed 425 pilots, Wilson contacted 109 additional pilots who declined to be interviewed. Of the 425 pilots, 47 pilots "made at least some type of direct or indirect reference to confidentiality and were therefore provided confidentiality."

During the second phase of polling in which Wilson interviewed 53 pilots, none expressed concerns about confidentiality and nine additional pilots were contacted but refused to be interviewed. No names were provided as a result of this polling, according to Comstock.

During the third phase, Wilson interviewed 828 pilots. Of these, 33 made references to confidentiality which Comstock states were honored. Wilson contacted a total of 143 additional pilots who refused to be surveyed.

Comstock reported results to members of ALPA and FEPOC at various points during and after the polling process. On November 21 and 22, during the first phase of polling, Comstock reported that "support for union representation had grown significantly since the first election" and "support for ALPA, USPA and NO representation was about equally divided.... [The] adjusted numbers produced an approximately 33% share" for each of these choices.

Comstock also advised ALPA that pilots had concerns about retirement pay. He advised ALPA that pilots from other airlines were considered "the most trustworthy source of information on the question of union representation and that this should be considered in planning future communications to the pilot group." According to Comstock, he told ALPA that they might be able to "win over" USPA supporters and should therefore not "alienate" these voters by being too critical of USPA.

[518]According to Comstock, Wilson's polling also revealed that pilots feared employer reprisal against pro-union pilots. Comstock claimed to have "received no reports whatsoever of any pilots who exhibited any fear of reprisals by ALPA, the Organizing Committee or its supporters against pilots who opposed representation."

Comstock provided written lists containing names of pilots who favored ALPA or could be considered potential ALPA supporters, and of pilots whom Wilson "determined... could be encouraged and persuaded to vote for ALPA."

> Other than these written lists containing a total of 273 names, no other information about the attitudes or preferences of specific individual pilots surveyed by the Wilson Center was communicated to ... the Organizing Committee, ALPA or any other entity. The Wilson Center did not provide the Organizing Committee, ALPA, or any other person or entity with the name of any pilot who said he would not vote or who said he opposed representation. The Wilson Center also did not provide the Organizing Committee, ALPA, or any other person or entity with the names of pilots who had either requested or raised concerns about confidentiality.
>
> * * *
>
> It is the policy of the Wilson Center not to provide clients with the names of respondents who either request or raise concerns about confidentiality. If any pilot who was telephoned by our interviewers either requested or raised concerns about confidentiality, the responses of that pilot were not disclosed to the Organizing Committee, ALPA or any other person or entity and that person was designated a "confidential respondent."

[519]The Wilson Center retained the confidential responses but did not disclose the names and/or individual responses of any of these confidential respondents to the

> Organizing Committee, ALPA, or any other person or entity....
>
> The names of confidential respondents were not included on the lists of names. (Emphasis in original)

D.

Polling by FEPOC

ALPA asserts that the Organizing Committee's telephone polling "consisted of pilots calling other pilots to talk about the representation election." ALPA denies the allegations that FEPOC members were given the names of anti-union pilots by Wilson, or that they targeted anti-union pilots for harassment or intimidation.

ALPA has provided an affidavit from Eric Vartanian, Chairman of FEPOC. Vartanian contends that the Wilson Center only provided FEPOC with names of pilots who had a somewhat favorable view of ALPA or were potential ALPA supporters. He denies that the confidentiality of responses were compromised. He argues that FEPOC's polling and that of the Wilson Center ran simultaneously, therefore "[i]t would have also been possible for a pilot who had been assured of confidentiality, to be called independently through the phone canvass operation."

> At the outset of the re-run campaign, the Organizing Committee made a conscious decision to attempt to contact as many Fed Ex pilots as possible to encourage them to vote for ALPA....During these conversations, callers would inquire as to the preferences of individual pilots in order to determine whether more time and resources should be spent on encouraging that particular pilot to vote for ALPA representation....
>
> [520]It is important to realize that the Organizing Committee had no knowledge of whether any particular pilot contacted during the phone canvass or in the Wilson

Center polling surveys had actually voted, or had even responded honestly and accurately to our inquiries.

E.

Federal Express also asserts that false survey information was leaked for the purpose of soliciting "no" voters to vote for USPA, thus resulting in a majority vote for representation. Federal Express submitted several affidavits which allege that crewmembers were told of rumors and "survey results" by ALPA supporters. The carrier argues that the distribution of this information ensured an outcome in favor of either some type of representation or representation by ALPA specifically. The carrier did not provide any evidence of written communication of survey results among crewmembers.

Eric Vartanian provided a response to this charge on behalf of ALPA. In a supplement to his affidavit, Vartanian denies that any FEPOC member leaked survey results during the campaign.

V.

Threats, Harassment, and Coercion

A.

Federal Express contends ALPA's threats, harassment, and coercion of Federal Express pilots constituted a "gross destruction of laboratory conditions." The carrier asserts three forms of conduct are violations of the RLA: (1) ALPA's telephone and face-to-face interrogations of pilots about their voting preferences; (2) ALPA's crowding and domination of the crew lounge during nightly hub turns; and, (3) ALPA's practice of bringing non-employee ALPA supporters onto Federal Express property to solicit pilots during working hours. Federal Express argues that this activity created a "hostile environment [which] was further exacerbated by the [521]systematic calling of all crewmembers and interrogating them regarding their voting intentions."

FEPNO charges ALPA with intimidation and coercion of pilots for the "express purpose" of pressuring them to both support and vote for ALPA. FEPNO points to the "actions of ALPA on the flight deck" in addition to the "presence of ALPA campaigners in areas normally reserved for pilots preparing their flight plans" as contributing to the hostile environment.

In support of its contentions, Federal Express provided six affidavits from crewmembers in which they discussed specific instances of "threatening" or "intimidating" treatment by fellow crewmembers who were ALPA supporters. Three affiants stated that they were involved in or witnessed "heated arguments" and confrontations with ALPA supporters in the crew lounge which produced a "disruptive and intimidating" atmosphere. Several affiants indicated they were subjected to verbal abuse and felt "intimidated", "pressured", "threatened, angry, and scared", as a result.

Crewmembers allege they were threatened with being blackballed and with being subject to "difficulties" on future check flights by ALPA supporters.

> In early December, 1992, in the Federal Express Memphis crew lounge on a hub turn, a Federal crewmember who is an ALPA supporter told me "that if I did not join ALPA, then when it came time for checkrides, I would have a very difficult time!"

Crewmembers also allege in-flight misconduct in connection with discussions about their non-support of ALPA. Two crewmembers alleged damage to their automobiles which they ascribed to ALPA supporters. Junior crew members claim confrontations with more senior officers were extremely intimidating.

> On December 11, 1992, at approximately 1:00 a.m., I observed that non-Federal [522]Express people were frequenting the crew lounge and engaging Federal Express crew members who were coming to and going from work in conversation about ALPA. I witnessed a heated and

> angry exchange between a Federal Express Captain and a non-Federal Express person. I was not close enough to hear the conversation, but the yelling was disruptive and intimidating for a junior guy like me. The atmosphere created by the presence of the non-employee person in the crew lounge was disturbing and pressurizing.

One individual stated that ALPA's campaign tactics were "very unethical."

Federal Express provided 13 affidavits in which crew members stated their various "beliefs" that: ALPA will harass them in the future for their anti-union activities; ALPA will retaliate for any refusal to pay dues or assessments; ALPA crewmembers will give unfavorable checkrides in retaliation for their non-union stance; ALPA will practice expulsion on non-union jumpseaters; ALPA's retaliation will surface in the cockpit and create unsafe flying conditions; pro-ALPA crewmembers will change maintenance log books and report false information to the FAA; and, pro-ALPA crewmembers will report minor technicalities and/or fabrications to the FAA concerning non-union supporters' flight performance.

ALPA denies the allegations and asserts that no evidence has been provided to support assertions concerning a design by ALPA supporters, organizers, or directors to retaliate against crewmembers.

B.

1.

Federal Express also alleges "ALPA brought non-Federal Express employees onto Federal Express property as either guests of crewmembers or under the guise of being interline jumpseaters in order to lobby Federal Express crewmembers in the Federal Express Memphis crew lounge." Federal Express asserts ALPA [523]was aware of the policy against non-employees soliciting on company property and intentionally avoided seeking management

approval, thus "improperly trespassing on Federal Express property."

Fred Peters, Flight Manager/Duty Officer for Federal Express, submitted an affidavit alleging an instance of such conduct and stating Federal Express' policy:

> In approximately late November or December, 1992, the Federal Express Pilots Organizing Committee, (FEPOC), held a formal meeting in the Memphis satellite crew lounge to discuss issues.
>
> Following that meeting, FEPOC, USPA, and the "NO" Committees were notified by management that meetings were not to be held on Federal Express Company property.
>
> * * *
>
> On December 9, 1992 FEPOC had, as their guest, ...[a United Airlines ALPA member] in the crew lounge.
>
> [This individual] participated in soliciting for the Air Line Pilots Association (ALPA).
>
> It is against Federal Express policy to allow non-employees to solicit on company property.

ALPA responds that, based on Captain Vartanian's affidavits, only one non-employee ALPA pilot was present in the crew lounge, and that this individual was present "with the full knowledge of Flight Duty Officer Fred Peters.... Peters voiced no objections whatsoever to [this individual's] presence or conduct." No evidence was submitted demonstrating approval or objection by Federal Express officials prior to or at the time of the non-employee's visit.

[524]2.

FEPNO has provided 131 affidavits in which crewmembers signified their agreement with the statement: "The domination of the Memphis crew lounge by the ALPA Organizers was overbearing and intimidating." One particular affiant attached additional comments stating:

> [T]he ALPA organization domination in the crew lounge was more intimidating than anything I have ever seen from management, even during my...years as an ALPA member.... Week after week the ALPA organizational committee controlled one side of the middle of the crew lounge as they pushed support and financial assistance for their cause. I know they feel that they were doing it in their own best interests; however, I truly felt like a lamb in the lions den. I felt extremely uncomfortable trying to conduct my preflight duties around their group. Their conduct was bullying to say the least. They could not have orchestrated a more overwhelming show of force and muscle even if that was their objective. I am convinced that this was a deliberate attempt, meant to sway votes by impressing others with their strength, determination and defiance of others. The pressure was enormous when you're made to feel like you're in the silent minority and all you have to do is sign on the dotted line, wear your ALPA pin and then you'll be accepted into their group with open arms.

ALPA argues that the statements from crewmembers only show that:

> ...some pilots were annoyed that members of the Organizing Committee and ALPA supporters were campaigning and discussing the election in the crew lounges. There is no evidence that pilots were actually coerced in the sense that they feared [525]reprisals by ALPA if they did not vote for ALPA representation.

DISCUSSION

In determining whether there has been interference in a representation election, the Board examines the record for evidence that the laboratory conditions essential to a fair election have been tainted. Federal Express Corporation, 20 NMB 7 (1993), Metroflight, 18 NMB 532 (1991), USAir, 17 NMB 377 (1990), Key Airlines, 13 NMB 153 (1986). Determinations of the Board are made in accordance with the requirements of the Railway Labor Act. Past cases include Fox River Valley Railroad, 20 NMB 251 (1993), Egyptair, 19 NMB 166 (1992), Florida East Coast Railway, 17 NMB 177 (1990), Air Wisconsin, 16 NMB 296 (1989), Long Island Rail Road Co., 12 NMB 187 (1985), Laker Airways, Ltd., 8 NMB 236 (1981), and Zantop International Airlines, 6 NMB 834 (1979).

The Board considers the facts and circumstances in their totality to determine whether the alleged actions tainted the laboratory conditions. USAir, supra. In reaching its decision in this case, the Board has relied upon the evidence and arguments submitted by the carrier and the organizations, the Mediator's investigation including interviews, and past Board determinations.

The Board has found a taint of laboratory conditions where there has been solicitation of employees to turn in their ballots to carrier officials, Mercury Services, Inc., 9 NMB 312 (1982), and when carriers have engaged in polling and keeping track of employees who have ballots, Laker, supra. Also, where there has been misrepresentations of the Board's ballot and/or voting procedures, USAir, 17 NMB 377 (1990), Allegheny Airlines, 4 NMB 7 (1962), and "veiled threats" concerning the consequences of representation, Key Airlines, supra, the Board has found such conduct taints the laboratory conditions.

The Board has also addressed allegations of misleading voters through campaign literature and factual misstatements, Metroflight, 19 NMB 254 (1992), [526]American Inter-Island, Inc., 8 NMB 410 (1981), and of misrepresenting Board policy and voting procedures by the distribution of sample ballots, Continental Airlines, 14 NMB

131 (1987), Long Island Rail Road Co., supra. Allegations of promising benefits or assuring protection against carrier actions, Metroflight, supra, Long Island Rail Road Co., supra, and intimidating, coercing, and threatening retaliation for failure to support efforts to unionize, Aerovias de Mexico, 18 NMB 130 (1991), Air Wisconsin, supra, Continental Airlines, supra, have also been the subject of Board decisions.

ALPA argues:

> [c]onsistent with [the legislative history of the Railway Labor Act], the NMB has made clear through its decisions in Federal Express and Air Wisconsin that the more limited role of a carrier in a representation campaign and its far greater ability to coerce employees because of the power it wields over them, requires a very high threshold for a finding of union interference.

Federal Express responds that "there is a single standard for conduct which destroys laboratory conditions" and that, "at some point, a union's conduct crosses the line to improper conduct."

In Air Wisconsin, supra, the Board noted:

> ...while the tests for union interference and carrier interference are the same — whether the laboratory conditions have been contaminated — because of the unique power and authority which carriers possess in the workplace, application of this standard to effectively identical factual situations involving alleged union vis-a-vis carrier interference may lead to different conclusions.

[527]I.

Misrepresentations of the Railway Labor Act and NMB Rules and Procedures

A.

Federal Express contends that ALPA, through FEPOC, violated the NMB's election rules by failing to inform voters of all their options. In support of this contention, Federal Express relies on Metroflight, 13 NMB 284 (1986), and Laker, supra for its assertion that the Board has "consistently held carriers responsible for failing to inform fully the electorate of all the voting alternatives available to them." However, a review of these decisions reveals that the Board did not actually make such findings. In Metroflight, supra, the Board found that the attempt to solicit and collect ballots from employees constituted election interference in violation of the Railway Labor Act and that the combination of this violation with the carrier's misrepresentations of Board policy and rules tainted the laboratory conditions. In Laker, supra, the Board required the carrier to make certain information available "where there is gross interference with a Board election", in order to attempt to restore laboratory conditions.

In the case at hand, FEPOC urged voters to "[v]ote for ALPA or USPA or tear up your ballot if that is your decision." A review of FEPOC statements and of the evidence developed through the investigation does not support a finding that FEPOC violated the Board's election rules.

B.

Federal Express contends that the "Hotline" message of October 20, 1992 demonstrates that ALPA understood the Board's decision in 20 NMB 7, yet ALPA "deliberately broadened, misrepresented and then distributed [the] exaggeration" that the Board had cited Federal Express for "coercive communications" in its November 12 press release.

[528]In Federal Express Corporation, the Board found that:

> There is a level of carrier communication, as in this case, which overwhelms an employee's right to select or not select a collective bargaining representative without carrier interference or influence....
>
> When a carrier's statements and material override, or render moot, the union's campaign, we find it objectionable and not within the employer's role as anticipated by the Act. In short, in the language of prior decision on this issue, we find the carrier's actions here have tainted the laboratory conditions necessary for the conduct of a fair election.

ALPA's characterization of the Board's decision as a finding of "coercive communications" does not rise to the level of misrepresentation which taints the laboratory conditions.

C.

Federal Express contends ALPA misrepresented the Railway Labor Act when Babbitt rejected Smith's invitation to debate and accused him of attempting to violate NMB rules and "contaminating the election process."

In response to this contention, ALPA argues that Smith's debate invitation and his request for all parties to agree not to file objections to any remarks made during the debates placed ALPA in the position of either:

> ...enabling Frederick Smith to assume a far greater role in the campaign than he should by becoming an active participant and self appointed overseer — or rejecting the debate challenge and being attacked as an enemy of free speech, afraid to answer tough questions....The Organizing Committee [529]should have never been forced into this predicament. The Organizing Committee reasonably

believed that Fed Ex's tactics and proposed debate rules constituted unlawful interference.

After consideration of the evidence and arguments on this issue, the Board finds that Babbitt's letter did not taint the laboratory conditions.

II.

Voter Confusion as a Result of USPA's Campaign

A.

Federal Express and FEPNO assert that USPA's campaign slogan ("A vote NO is a vote for ALFA") confused and deceived crewmembers as to their voting rights and options. They contend that the slogan was a misrepresentation of NMB voting procedures and that its use resulted in crewmembers voting for USPA when they did not want any representation. The carrier argues that failure to "accurately and completely represent" voting procedures constitutes a taint of the laboratory conditions.

In support of its argument, the carrier cites several Board decisions: USAir, 17 NMB 377 (1990); Metroflight, 13 NMB 284 (1986); Zantop International Airlines, 6 NMB 834 (1979); and, Allegheny Airlines, 4 NMB 7 (1962).

In USAir, the Board found that the carrier's assertions as to the consequences of a union election victory contained inaccuracies and misstatements about the Board's rules regarding representation and decertification procedures and the ability to strike.

In Metroflight, the carrier misrepresented Board policy in a letter which informed employees that they could vote against representation by writing "no" on their ballot and returning it to one of several carrier officials. The Board held that the attempt to collect ballots was a per se violation of the Act, and that misleading

employees regarding voting options [530]while attempting to collect ballots tainted the laboratory conditions.

In Zantop International Airlines, the Board determined that, where a carrier takes action to communicate with its employees regarding the rules of a representation election:

> Employees should be given accurate information concerning the method of voting and the consequences of voting. While a carrier may provide accurate information which shows an employee how to act to defeat a union, failure to inform an employee that writing "no union" will void the ballot is inherently misleading.

In Allegheny Airlines, the Board found the carrier made misleading statements where the carrier only partially informed employees of voting procedures but failed to inform them that voting "no union" would void their ballots.

It is clear from a review of these and other Board decisions that a carrier has no obligation to inform employees of their voting options. However, where a carrier communicates information about election rules and voting procedures, consistent with the requirement to maintain laboratory conditions the Board requires the carrier to provide accurate information which does not mislead employees.

The Board finds that USPA's slogan did not constitute a misrepresentation of Board voting procedures or policies. USPA did not assert that voting against representation was not an available option for crewmembers, but rather that, in USPA's judgment, some form of representation was likely and the effect of not voting or voting "no" would be to ensure ALPA as the winner of the election. USPA did not assert that the Board would count a "no" vote as a vote in favor of ALPA, but rather that efforts to defeat ALPA were more likely to succeed if crewmembers supported USPA.

Both Federal Express and FEPNO have submitted affidavits in which crewmembers state that they were [531]confused about their

voting options and the effect of their votes. The Board has carefully considered all the evidence from these affidavits and from the additional interviews it has conducted in an effort to determine the precise nature of these crewmembers' confusion.

The carrier and FEPNO have presented insufficient evidence that the USPA campaign slogan caused crewmembers to believe that Board voting procedures and policies had eliminated the option of voting against representation. The Board reviewed over 300 affidavits from Federal Express crewmembers and conducted interviews with randomly selected crewmembers as previously noted. Only six crewmembers stated that they voted for USPA to avoid any representation because they were confused. Moreover, all six of these individuals stated their confusion was not a result of misunderstanding Board voting procedures; rather, they were confused about whether the most effective way to defeat ALPA was to vote "no" or to vote for USPA. Although many crewmembers did not agree with the Board's policies, all of these USPA voters state that they understood the procedures and made a decision based on their best judgment of how to stop ALPA.

An examination of the evidence shows that several crewmembers may have been uncertain whether the best way to defeat ALPA was to vote "no" (or to not vote), or to support USPA. Individual crewmembers weighed the effect of their vote against the anticipated votes of their fellow crewmembers. Several crewmembers were convinced that some form of representation was inevitable and decided to support USPA as the alternative to ALPA. Others believed that, because in their judgment a majority vote for representation was not inevitable, it was possible to avoid representation altogether by not returning a ballot.

It is clear, based on the affidavits and interviews, that crewmembers understood how to vote against representation and the effect of not returning a ballot. Crewmembers understood the Board's policy, which was printed on the ballot (and the sample ballot distributed by USPA) as:

[532]INSTRUCTIONS FOR VOTING

> No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified. Should a majority vote to be represented, the representative which receives a majority of the votes cast will be certified.

The USPA campaign slogan and statements did not contradict or misrepresent these procedures and policies.

B.

The carrier also asserts that USPA's distribution of an "altered" ballot combined with its misrepresentations of the Board's processes destroyed the laboratory conditions. The carrier cites Allegheny Airlines, supra as precedent for overturning an election on the basis of this conduct. As the Board stated there, "[a]side from the fact that the Carrier engaged in a misrepresentation of the Board's ballot and voting procedure, the important fact is that the Carrier knew that a ballot marked 'No Union' would be a void ballot but did not so inform its employees." As discussed above, the Board finds that neither USPA nor ALPA misrepresented its voting policies or procedures. A write-in vote is counted as a valid vote and not a void ballot. The ballot was clearly marked "SAMPLE" and "VOID". In addition, insufficient evidence has been presented to show that the sample ballot created the impression that the impartiality of the Board had been breached. See, Long Island Rail Road, 12 NMB 187 (1985). Therefore, the Board finds no basis for finding that USPA tainted the laboratory conditions.

C.

Finally, neither Federal Express nor FEPNO provided sufficient evidence to demonstrate any degree of complicity between ALPA and USPA. Crewmembers' opinions regarding the intent of USPA organizers and their suspicions of the organizers' objectives do not warrant a finding of a taint of laboratory conditions.

[533]III.

Misrepresentations of Carrier Practices and Policies

Federal Express contends that ALPA intentionally misrepresented the policies and practices of the carrier concerning the E-mail bulletin board, the pension legislation, and crewmembers' career earnings and benefits. The carrier argues that these alleged misrepresentations "constitute objectionable conduct."

ALPA defends its statements as: (1) an expression of a reasonable opinion about carrier motives in establishing the E-mail bulletin board; (2) a reminder that the pension legislation would not compel Federal Express to improve its benefits package; and (3) an accurate report based on conservative assumptions which are reasonable industry standards.

The Board finds that Federal Express has not demonstrated that ALPA misrepresented the carrier's policies and practices. Moreover, in the context of an election campaign, ALPA's alleged statements did not taint the laboratory conditions.

IV.

Illegal Polling

Federal Express argues that the polling of crewmembers by ALPA and the Wilson Center should be held to be a per se violation of the Railway Labor Act. Federal Express contends that ALPA and FEPOC had access to confidential poll results and targeted crewmembers for harassment, threats, and intimidation. The carrier asserts that because ALPA gave the impression that it was keeping lists of how crewmembers were voting and because ALPA's power to re-taliate against crewmembers is "comparable to that of a carrier", this "direct pressure...destroys the basic concept of a secret ballot election."

Federal Express relies on Mercury Services, Inc., 9 NMB 312 (1982) as authority for its assertion that "[t]he NMB has expressly prohibited carrier and union [534]questioning regarding an employee's vote." The Board's review of these decisions reveals otherwise. In Mercury Services, the Board found the carrier had tainted the laboratory conditions, not by polling employees, but by soliciting employees to turn in their ballots to carrier officials. The Board described this conduct as "analogous to polling employees about their views." (Emphasis supplied) The carrier's solicitation and collection of ballots was held to be a per se violation which interfered with the employees' exercise of their right to self-organization.

The Board views polling of employees during a representation election as one instance where the application of its standard (whether the laboratory conditions have been tainted) to "effectively identical factual situations involving alleged union vis-a-vis carrier interference may lead to different conclusions." Air Wisconsin, supra. Whereas polling by a carrier is coercive precisely because of the substantial and material ability of the carrier to act against employees, the kind of polling evidenced here did not carry with it the same threat of imminent retaliation. Cf. generally, NLRB v. Exchange Parts Co., 375 U.S. 405 (1964).

The Board finds that Federal Express and FEPNO have provided insufficient evidence to show the laboratory conditions have been tainted due to the polling by ALPA or the Wilson Center. No evidence was provided to support the contentions that the Wilson Center compromised the confidentiality of any crewmember's responses or that ALPA's conduct had any effect on the crewmembers' exercise of their right to free choice of representatives. The affidavits submitted contain assertions of crewmembers' "feelings" of intimidation and invasion of the privacy of their votes. Although many crewmembers provided statements that they "believed" that ALPA would retaliate against them for their lack of support or their anti-ALPA stance, neither the carrier nor FEPNO provided any evidence to support these allegations.

Similarly, the Board finds the carrier and FEPNO have provided insufficient evidence to show that the alleged release of polling information resulted from [535]conduct on the part of ALPA or FEPOC, or that ALPA's use of this information tainted the laboratory conditions of the election.

V.

Threats, Harassment, and Coercion

Federal Express contends that ALPA supporters created a "hostile environment" by: (1) interrogating crewmembers in the telephone polls and in face-to-face confrontations; (2) dominating the crew lounge during hub turns; and (3) bringing non-employee ALPA pilots onto Federal Express property during working hours. The carrier claims this conduct constituted a "gross destruction of laboratory conditions."

FEPNO contends that ALPA supporters intimidated and coerced crewmembers to pressure them to support ALPA. FEPNO also contends that ALPA supporters contributed to the "hostile environment" through incidents of improper conduct on the flight deck and in the crew lounge.

The affidavits provided by Federal Express and FEPNO in support of their contentions for the most part contain allegations against unidentified fellow crewmembers. Very few affidavits contain allegations of misconduct by specific individuals (fellow crewmembers). No affidavits contain allegations of threats, harassment, or coercion by ALPA officials. Nor has Federal Express presented evidence of the "intimidating" effect of non-employees "trespassing" on company property. The Board notes there is insufficient evidence of objections to, or a regularly enforced policy against, the presence of non-employees in the crew lounge. The Board considers the union campaign here to be appropriate, as opposed to the coercive nature which the same conduct would have when engaged in by a carrier. See, Air Wisconsin, supra. Therefore, the Board finds that ALPA's conduct did not taint the laboratory conditions.

CONCLUSION AND CERTIFICATION

When the Board views the record in this case in its totality, it finds that the laboratory conditions [536]were not tainted. The Board finds that the carrier has not provided sufficient evidence to support its assertions that crewmembers were confused about the Board's election rules or that ALPA's or USPA's alleged misrepresentations tainted the laboratory conditions. In addition, the crewmember interviews conducted by Mediator Oppenberg failed to disclose any confusion over the Board's voting procedures. Based on the evidence submitted by the carrier and FEPNO and the information obtained as a result of the Mediator's investigation, the Board finds no basis for conducting any additional interviews.

The Board finds further that ALPA did not engage in improper polling nor did it threaten or harass employees, such as to result in a taint of the laboratory conditions.

In accordance with Section 2, Ninth, of the Railway Labor Act, as amended, and based upon its investigation pursuant thereto, the National Mediation Board certifies that the Air Line Pilot's Association has been duly designated and authorized to represent for the purposes of the Railway Labor Act, as amended, the craft or class of Flight Deck Crew Members, employees of Federal Express Corporation.

By direction of the NATIONAL MEDIATION BOARD.

/s/
William A. Gill, Jr.
Executive Director

Copy to:

Steven H. Taylor, Esq.
Jonathan A. Cohen, Esq.
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APPENDIX F

DECISION OF THE

NATIONAL MEDIATION BOARD

January 5, 1993

[20 NMB 126]
NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

[SEAL
OMITTED]

20 NMB No. 21
January 5, 1993

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Re: NMB Case No. R-6044
Federal Express Corp.

Gentlemen:

On December 2, 1992, the Federal Express Pilots for a Non-Union Organization (FEPNO) filed a Motion for Clarification or Reconsideration of the Board's decision in 20 NMB 7 (1992). In Federal Express Corp., 20 NMB 7 (1992), the Board found that

the carrier had tainted the laboratory conditions in an election in which ALPA was seeking to represent the craft or class of Flight Deck Crew Members. As a remedy, the Board ordered a re-run election using the [127]Board's standard ballot[1] with ALPA on the ballot. The ballots were mailed December 3, 1992, and the count is scheduled for January 14, 1993.

On December 3, 1992, in 20 NMB 91, the Board stated that based upon its "initial review, it appears that [FEPNO's] Motion is untimely and that the organization has failed to provide any sufficient basis" for consideration of the Motion. However, the Board provided all participants in this case with an opportunity to file comments by December 9, 1992. Comments were filed by Federal Express, the Air Line Pilots Association (ALPA) and the United States Pilots Association (USPA). On December 8, 1992, FEPNO requested an opportunity to file a reply to the other participants' submissions. FEPNO's request was granted. FEPNO's reply was filed December 14, 1992. The carrier, ALPA and USPA filed responses on December 21, 1992.

I.

In its initial submission, FEPNO asserted that USPA was conducting a campaign to receive write-in votes. FEPNO maintained further that USPA's campaign communications have informed voters that "to vote no ... is ... a vote for ALPA." FEPNO requested the Board either to use a ballot without a space for write-ins, or if the Board used the standard ballot, to require that a majority of eligible voters cast valid votes for ALPA or USPA in order for either organization to be certified, with a statement on the ballot to that effect.

---

[1] The Board's ballot in this case contains a box next to ALPA's name, and a separate space for write-in votes. Should a majority of eligible employees cast valid ballots, the organization which receives the majority of those votes would be certified as the representative of the craft or class.

[128]FEPNO based its argument on the premise that it was "seek[ing] to preserve the democratic principle of majority rule...".

On December 8, 1992, FEPNO also challenged the Board's finding that its Motion is untimely, arguing that "[t]he Board's internal operating procedures do not constitute a rule with the force of law...".

II.

The carrier takes the position that "USPA's [campaign] conduct has made it totally impossible for a fair and informed election to take place." The carrier agrees with FEPNO that "before any ... organization is certified, it should be required to demonstrate that a majority of the craft or class actually wants union representation, and representation by a particular union." Federal Express also maintains that USPA's campaign communications have "distorted the Board's processes...".

ALPA urges the Board to uphold its December 3, 1992 decision. First, ALPA argues that FEPNO's Motion was untimely and failed to provide a sufficient basis for reconsideration. ALPA also cites Board decisions in 1987[2] and 1992[3] not to alter the standard ballot. Finally, ALPA contends that FEPNO's and the carrier's assertion that a re-run election should be held if neither organization receives votes from more than 50% of the eligible voters "is totally unsupported in NMB case law and practice."

[129]USPA also opposes FEPNO's Motion. USPA bases its position on the fact that FEPNO's Motion was untimely, and "contrary to Board precedent". Citing Zantop International Airlines, Inc., 9 NMB 70 (1981), USPA argues that "[t]he Board has recognized that, in some instances, the write-in provision is the

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[2] In the Matter of the Petitions of the Chamber of Commerce and the International Brotherhood of Teamsters, 14 NMB 347 (1987).

[3] NMB Release No. 92/32, September 2, 1992.

only way to 'ascertain the true desires of the eligible employees' ". As did ALPA, USPA also asserts that FEPNO's request for an alteration of the Board's standard election procedures is not supported by precedent. Finally, USPA argues that FEPNO has misrepresented the Board's December 3, 1992 decision in order to persuade the electorate not to vote. USPA has provided a copy of a communication from FEPNO which urges Flight Deck Crew Members to "Hold Your Ballot".

III.

In its December 14, 1992 response, FEPNO argues that the laboratory conditions in the re-run election have been tainted and that "every entity involved ... has reached the same conclusion...". FEPNO renews its request for a "two-step election", and urges the Board to hold a run-off election under §1206.1 of the Board's Rules in the event "a majority of those voting do not either: 1) vote against certification; or 2) vote by a majority ... for one ... representative over all others."

In the carrier's December 21, 1992 submission, Federal Express also insists that the laboratory conditions have been tainted by USPA's "misrepresentations." Federal Express urges the Board to "immediately [conduct] an on-the-property investigation of USPA's distortions and misrepresentations...". The carrier urges, in the alternative, that "if the Board is unwilling to tailor its election procedures to the unique facts of this case" it should order a new election.

ALPA, in its December 21, 1992 submission, asserts that FEPNO is attempting to "manipulate the [130]process" and requests the Board to "immediately dismiss FEPNO's untimely and frivolous petition." According to ALPA, there is no basis for FEPNO's position that Section 15.0 of the Board's Representation Manual is without force of law. ALPA also contends that the Board's Rules which govern re-run elections are not applicable in this case, pointing out that the Board conducts run-offs "only where no representative receives a majority of the votes cast in favor of representation". ALPA disputes FEPNO's characterization of

USPA's campaign communications as "distortions," and maintains that FEPNO's campaign communications stating "a vote for USPA is a vote for ALPA", is equivalent to USPA's statement. ALPA also disputes FEPNO's assertion that "every entity" including ALPA has acknowledged that the laboratory conditions have been tainted.

USPA urges the Board to "promptly" dismiss FEPNO's Motion. USPA expresses its concern that FEPNO is misrepresenting Board law, and that Federal Express has "exploited the Board's request for comments by using its comments as a cover for unlawful propaganda...". According to USPA,

> [t]he absence of an NMB decision resolving this matter has had a significant impact on pilots' decisions to cast their ballots. Specifically, pilots who support USPA, but, who would prefer no union to representation by ALPA, are withholding their ballots for fear that their vote will not be counted toward the union of their choice....Federal Express pilots need to be reassured that...their write-in votes will be given full effect. In the absence of such reassurance, provided in a timely fashion, many USPA voters will be effectively disenfranchised.

[131]IV.

The Board's decision in 20 NMB 91 (1992) was based upon its application of Section 15.0 of the Board's Representation Manual. Section 15.0 of the Representation Manual provides, in part, that Motions for Reconsideration of Board decisions "will be given consideration only [if] ... received within 10 working days of the decision's date of issuance...". The Board's decision authorizing the current election was issued on October 19, 1992. FEPNO's Motion was filed December 2, 1992, the day before the ballots were scheduled to be mailed, and 44 days after the Board's October 19 decision.

The submissions received since December 3, 1992, have failed to persuade the Board that FEPNO's Motion was timely.

Even if the Motion had been timely, however, the Board's review of the position statements submitted by FEPNO and the carrier leads it to conclude that there is an insufficient basis for reconsideration of the Board's October 17, 1992 decision, including the form of the ballot. FEPNO and the carrier have provided neither substantive evidence, nor persuasive legal argument in support of their request for the extraordinary relief requested.

Similarly, the Board finds the evidence and argument submitted on the allegation of taint to the laboratory conditions fail to provide a sufficient basis for granting FEPNO's and Federal Express' extraordinary request for various forms of "remedial" relief prior to the ballot count. See, USAir, 17 NMB 28 (1989). The Board refers the participants to Section 11.5 of the Board's Representation Manual which governs allegations of election interference.

CONCLUSION

The Board finds that FEPNO's Motion of December 2, 1992 is untimely and does not provide a sufficient [132]basis for the relief requested. There is also an insufficient basis for the Board to grant the various forms of "remedial" relief requested prior to the count. The count will take place as scheduled on January 14, 1993.

By direction of the NATIONAL MEDIATION BOARD.

/s/
William A. Gill, Jr.
Executive Director

APPENDIX G

DECISION OF THE

NATIONAL MEDIATION BOARD

December 3, 1992

[20 NMB 91]

NATIONAL MEDIATION BOARD

WASHINGTON, D.C. 20572

[SEAL OMITTED]

(202) 523-5920

20 NMB No. 13
December 3, 1992

Myles J. Tralins, Esq.
Tralins and Associates
Suite 3310
One Biscayne Tower
2 South Biscayne Boulevard
Miami, FL 33131

Re: Case No. R-6044
Federal Express Corp.

Dear Mr. Tralins:

This will address your December 2, 1992, Motion for Clarification or Reconsideration of the Board's decision in 20 NMB 7 (1992) filed on behalf of the Federal Express Pilots for a Non-Union Operation (FEPNUO).

I.

In its decision, dated October 19, 1992 the Board found that Federal Express had tainted the laboratory conditions in an election in which the Air Line Pilots Association (ALPA) was seeking to represent the carrier's Flight Deck Crew Members. As a remedy,

the Board ordered a re-run election, using the Board's standard ballot[1] with ALPA on the ballot.

[92]Ballots are scheduled to be mailed December 3, 1992, and the count is scheduled for January 14, 1993.

FEPNUO asserts that another organization, the United States Pilots Association Organizing Committee (USPA) is conducting a campaign to receive write-in votes. FEPNUO further maintains that USPA's campaign communication have informed voters that "to vote no...is...a vote for ALPA." According to FEPNUO the Board should use a ballot without a space for write-in votes, or, if the Board uses its standard ballot, the Board should require that a majority of eligible voters cast valid votes for ALPA or USPA in order for either organization to be certified and should include a statement on the ballot to that effect. FEPNUO argues that since USPA was not a party in the original election that "a re-run election which interjects third parties is not a re-run election...but..an altogether new election". FEPNUO bases its argument on the premise that it "seek[s] to preserve the democratic principle of majority rule...".

II.

Section 15.0 of the Board's Representation Manual provides that Motions for Reconsideration of Board decisions "will be given consideration only [if]... received within 10 working days of the decision's date of issuance...". The Board's decision, which included a determination of the form of ballot to be used, was issued on October 19, 1992. Based upon the Board's initial review, it appears that FEPNUO's Motion is untimely, and that the organization has failed to provide any [93]sufficient basis for the Board to consider its Motion. Accordingly, the ballots will be mailed as scheduled. However, all participants in this matter may

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[1] The Board's ballot in this case contains a box next to ALPA's name, and a space for write-in votes. Should a majority of eligible employees cast valid ballots, the organization which receives the majority of those votes would be certified as the representative of the craft or class.

file comments on the Motion by 4:00 P.M., Wednesday, December 9, 1992. The Board will issue its final decision as expeditiously as possible.

By direction of the NATIONAL MEDIATION BOARD.

/s/
William A. Gill, Jr.
Executive Director

cc-to:

Mr. Kenneth R. Masterson
Mr. Donald W. Maliniak
Mr. J. Randolph Babbitt
Jonathan A. Cohen, Esq.
Gary Gordon, Esq.
United States Pilots Association, Inc.

APPENDIX H

FINDINGS UPON

INVESTIGATION-AUTHORIZATION OF ELECTION

OF THE NATIONAL MEDIATION BOARD

October 19, 1992

[20 NMB 7]

NATIONAL MEDIATION BOARD

WASHINGTON, D.C. 20572

[SEAL OMITTED]

In the Matter of the Application of the AIR LINE PILOTS ASSOCIATION alleging a representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act, as amended involving employees of FEDERAL EXPRESS CORPORATION	20 NMB No. 4 CASE No. R-6044 FINDINGS UPON INVESTIGATION-AUTHORIZATION OF ELECTION October 19, 1992

On May 30, 1991, the Air Line Pilots Association (ALPA) filed an application pursuant to the Railway Labor Act, as amended, 45 U.S.C. §152, Ninth, alleging a representation dispute among Flight Deck Crew Members, employees of Federal Express Corp. This application was docketed as NMB Case No. R-6044.

At the time the application was filed, these employees were unrepresented.

The Board assigned Mediator Laurette M. Piculin to investigate. Based upon the investigation, on June 14, 1991, the Board found a dispute to exist and authorized an election. Ballots were mailed on July 12, 1991 and the count was held on August 22, 1991. On August 21, 1991, ALPA filed a "Notice of Election Objections Based on Carrier Interference". The organization

requested the Board to conduct a re-run election to remedy the carrier's interference in the event ALPA lost the election.

The results of the ballot count, conducted on August 22, 1991, were that ALPA received votes from 1112 of the 2279 eligible voters. Five other valid votes were cast. The total of valid votes, 1117, was 23 votes less than the majority needed for certification.

[8]Between August 22, 1991, and January 15, 1992[1], ALPA and Federal Express filed position statements and other documents on the issue of carrier interference. Mediator Piculin conducted interviews with approximately 40 individuals, including carrier officials, witnesses on behalf of ALPA, and randomly selected employees, between March and June 1992.

ISSUE

The issue before the Board is whether Federal Express' actions tainted the laboratory conditions necessary for a fair election under the Railway Labor Act, i.e., whether the carrier's actions constituted "interference, influence or coercion" for the purposes of Section 2, Ninth, of the Act.

CONTENTIONS

ALPA's Position

The organization argues that Federal Express has tainted the laboratory conditions which the Board deems necessary for a fair

---

[1] On February 24, 1992, the Board revised its Representation Manual to include certain limits on election interference objections. This case was not affected by those limitations.

election. According to ALPA, the carrier's alleged illegal activities included:[2]

1. Promising or conferring unusual benefits during the campaign;

[9]2. Engaging in surveillance or indirect polling;

3. Providing the Board with an inaccurate address list;

4. Assisting and endorsing the efforts of the "Independent Pilots for a Non-Union Operation";

5. Pre-empting ALPA's potential negotiating role through the establishment of a "permanent scope committee" during the election period;

6. Conducting an anti-ALPA campaign through written communications;

7. Making misrepresentations about ALPA; and

8. Threatening to furlough employees if ALPA won the election.

ALPA has requested a re-run election using a "Key"[3] ballot.

---

[2] On November 8, 1991, ALPA filed a supplemental submission of objections based on certain post-election activity on the part of the carrier. On November 27, 1991, the carrier filed a response in which it asserted that ALPA's contentions were both "meritless" and "untimely".

[3] In a "Key" election the majority of eligible voters must vote against representation in order to prevent certification. See, Key Airlines, 16 NMB 296 (1989).

Federal Express' Position

The carrier "vehemently denies" ALPA's allegations. In addition, Federal Express asserts that it "exercised its right of free speech" in issuing campaign communications and made certain statements in response to ALPA's statements. The carrier also maintains that any benefits granted were done so in the regular course of business. Federal [10]Express urges the Board to certify the election results and to dismiss ALPA's application. The carrier also had requested either a hearing or an on-the-property investigation.

FINDINGS OF LAW

Determination of the issues in this case is governed by the Railway Labor Act, as amended, 45 U.S.C. §151, et seq. Accordingly, the Board finds as follows:

I.

Federal Express Corp. is a common carrier by air as defined in 45 U.S.C. §181 of the Act.

II.

ALPA is a labor organization and representative as provided by 45 U.S.C. §151, Sixth and §152, Ninth, of the Act.

III.

45 U.S.C. §152, Third, provides, in part:

> Representatives...shall be designated...without interference, influence, or coercion....

IV.

45 U.S.C. §152, Fourth gives employees subject to its provisions "...the right to organize and bargain collectively through

representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter." This section also provides as follows:

> No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of [11]their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees...or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization.... (Emphasis added).

V.

45 U.S.C. §152, Ninth, provides that the Board has the duty to investigate representation disputes and to designate who may participate as eligible voters in the event an election is required. In determining the choice of the majority of employees, the Board is "authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives by the employees without interference, influence or coercion exercised by the carrier." (Emphasis added).

FINDINGS OF FACT

I.

Promising or Conferring Benefits

A.

On August 2, 1991, Federal Express announced that American Airlines had agreed to grant Federal Express pilots reciprocal jumpseat privileges. The memorandum which communicated this information was issued by Jay Barnwell, System Chief Pilot, and stated as follows:

> After months of exhaustive efforts we have secured a Reciprocal Jumpseat Agreement with American Airlines, Inc., AMR Eagle, [12]Inc. and AMR Eagle's affiliated companies. This agreement extends the ability for ourcrew members to occupy seats on American Airlines, AMR Eagle, Flagship, Simmons and Wings West Airlines.
>
> ***
>
> This has been a long awaited benefit that will help our pilot workforce. Please conform to American's policies to insure a long and favorable relationship....

According to ALPA, while it was true that this was "a long awaited benefit", the "conferral" of this benefit during the election period "was calculated to influence and change voters." According to the carrier, it had been attempting to reach the agreement with American for several months. The agreement was reached July 24, 1991, and was announced "in the normal course of events."

B.

ALPA maintains that the carrier's announcement that "widebody pay" would apply to pilots flying the Airbus 300 (A-300) also constituted an improper conferral of benefits. According to the organization, during the campaign, the carrier sent all pilots a videotape featuring Federal Express Chairman and CEO Frederick Smith and Chief Operating Officer James Barksdale. Smith and Barksdale discussed recent aircraft acquisitions, including the A-300. In response to a question as to whether the A-300 would be considered a widebody or narrowbody for compensation purposes, Smith stated that the plane would be considered a widebody. Widebody pay is higher than narrowbody pay.

Federal Express has submitted an affidavit from David F. Sutton, Assistant General Manager/Aircraft Acquisition and Sales. According to Sutton, the "industry definition of a "widebody" is an

aircraft that contains a twin-aisle seat configuration in a passenger operation", whereas a "narrowbody" contains a single-aisle seat configuration...". Sutton further [13]states that the A-300 "is defined by the airline industry as a "widebody." Federal Express has also submitted other documents in support of its assertion that the A-300 is "universally" considered a widebody, including Airbus literature describing the A-300 as a widebody.

C.

ALPA asserts that the carrier implicitly promised improvements in retirement benefits during the campaign. The specific benefit referred to derives from proposed legislation, known as the Pension Access and Simplification Bill, H.R. 2730. This bill contains a provision which would eliminate the differences between union and non-union pilot pension plans under §410(b)(3)(B) of the Internal Revenue Code.

The organization cites Allegheny Airlines, 4 NMB 7 (1962) in support of its contention that Federal Express implicitly promised pension benefits, and therefore coerced its employees. In Allegheny, the Board found that the carrier, through the totality of its conduct, had interfered with employee freedom of choice. Among the carrier actions which the Board found objectionable was a letter which contained misrepresentations about Board voting procedures and statements such as, "If you vote for the union, your whole future may be altered, the whole future of Allegheny may be altered. An outside minority will seize your rights." The letter also included discussion of a future pension plan which the carrier alleged was under "active consideration" but concerning which it was "not allowed to make promises...in view of the election."

[14]According to a statement made by Bruce Cheever, a Federal Express pilot who was chairman of the carrier's Flight Advisory Board (FAB),[4]

> ...Section 410(b)(3)(B)...permits an airline employer to script a tax-qualified pension package for its air pilots that is tailored to their unique requirements [but] only where the air pilots have entered into a collective bargaining agreement in accordance with Title II of the Railway Labor Act.... The proposed amendment...is designated simply to eliminate the union-representation requirement...to allow all air pilots the opportunity to have tax-qualified plans tailored to pilots' needs....

Cheever made this statement in February of 1990 to a House Subcommittee. The amendments were not passed in 1990, however, similar provisions were introduced in a 1991 bill.

In a letter to "All Federal Express Crewmembers" dated June 16, 1991, on the subject of collective bargaining, Barksdale discussed the possible consequences of electing ALPA. Barksdale's letter contained several pages of discussion of various issues. On the issue of a retirement plan, Barksdale wrote in part,

> [15]...as final food for thought on the subject of ALPA and the right to ask for a separate retirement plan, how would you feel about paying ALPA dues if Congress grants non-union pilots the right to ask for a separate retirement plan next year?

---

[4] The FAB is an entity established at Federal Express in the early 1980's, whose membership, elected by the carrier's pilots, consists of flight crewmembers. The FAB meets with management to discuss work-related issues on a quarterly basis, and meets once a month as a working committee. The purpose of the FAB as set forth in its charter is "to provide a coherent method of communication between...Flight Crewmembers and...Management." The FAB reviews and discusses such issues as working conditions, safety, and work rules.

On July 11, 1991, Barksdale sent another letter to "All Crewmembers", which contained the following:

> As I am certain you've heard by now, our two-year effort to get legislation passed on the pilot retirement issue recently took giant steps forward.
>
> House Ways and Means Committee Chairman Dan Rostenkowski and a number of members of his committee agree with us that the current laws prohibiting separate retirement plans for non-union pilots are inherently unfair. As a result, he personally introduced legislation designated to remedy that inequity....
>
> I was dumbfounded to read the attached letter from Randy Babbitt to Chairman Rostenkowski....[which] states ALPA's strong opposition to the bill which is designed to provide a level playing field for our pilots.
>
> Throughout this campaign ALPA organizers have portrayed ALPA as the friend and protector of all airline pilots. Since the attached letter is totally inconsistent with those claims, a number of serious questions surface....
>
> I've told you before that ALPA is a big business with its own goals, agenda and political needs. Apparently the needs of Federal Express pilots are irrelevant to ALPA when those needs are out of step with its own organizational agenda. In this case I believe ALPA's desire for several million dollars of your income in the form [16]of dues was more important to them than seeing that fairness prevails....

ALPA responded on July 13, 1991, and stated in part:

> What guarantee do we have that management will give us a better pension plan even if the law is changed?.... Given the unwillingness of management to take advantage of existing provisions for improving pilots' retirement

> benefits, it is questionable as to whether they will actually make use of the provisions they are currently advocating.
>
> It is clear that management is using this legislation to imply promises that they will not be obligated to keep.

ALPA also sent a "Bulletin" entitled "Why We Oppose the Pension Simplification Act." The "Bulletin" stated, in part:

> Our management is using your FEPAC (Federal Express Political Action Committee) contribution to lobby for a change to the pension law which will allow them...to tell you that they will set up a separate pension plan for pilots, but with no front end guarantee that they will really do it....

Barksdale responded on July 16, 1991:

> "I believe [ALPA's] statements are attempts to bait the company since any answer could be claimed by ALPA to be improper employer interference....
>
> You all know that the Company has pursued this legislation for the past two years. I am confident you can judge for yourself whether the organizing committee has accurately assessed our intentions....

[17]Finally, on July 23, 1991, ALPA issued a letter, "The Real Issue - Final Word on the Pension Simplification Plan." The letter included the following statement:

> **Nothing the company has ever stated** ... suggests, intimates, recommends, promises or in any way **obligates them to improve our pension plan** and secure those improvements for years to come, even if the proposed legislation is enacted. (Emphasis in original).

To date, Congress has not passed the Pension Simplification Act.

II.

Surveillance and Polling

A.

According to ALPA, Federal Express managers engaged in surveillance in the Memphis crew lounge "during hub turns after it became clear that an election would take place." Two pilots have submitted declarations in support of the organization's assertion. Both individuals state that shortly after March 4, 1991, the date the organizing committee began its distribution of authorization cards, they noticed at least two or three managers in the crew lounge area during hub turns. Both pilots assert that this was "very uncommon." Both also observed various Flight Managers and Chief Pilots engaging in "small group discussions" with pilots between March and July, 1991.

ALPA also asserts that meetings held in five cities in six days also constituted surveillance. In June 1991, pilots received an announcement that "pilot meetings" would be held in Anchorage, Alaska. on July 14, Los Angeles, California on July 16, JFK Airport, New York and Indianapolis, Indiana on July 18, and Memphis, Tennessee on July 19. The announcement [18]further stated that "featured in the meetings will be Fred Smith and Jim Barksdale" and ended with the following note: "(Crewmember attendance is voluntary)."

According to one of the pilots who submitted an affidavit on behalf of ALPA, prior to ALPA's organizing campaign Smith and Barksdale "rarely if ever met with...pilots in the crew lounge areas...". ALPA asserts that "pilots could reasonably believe that their absence would be perceived as both support for the union and a personal affront to Frederick Smith...".

In response to ALPA's assertions, the carrier maintains that "Federal Express has held voluntary meetings...since the company was founded." The carrier has also submitted affidavits from various flight managers and Chief Pilots who for the most part,

either deny spending more time in the crew lounges, or who maintain they were there for other purposes. In the course of her investigation, Mediator Piculin interviewed Flight Manager Fred Peters. Peters functioned as a flight duty officer in Memphis during the election period. As a flight duty officer, Peters was stationed in the Memphis crew lounge as "a direct representative of the Vice President of Flight Operations for the hub turn." The mediator asked Peters if there was an increase in the number of managers in the crew lounge during the campaign period. Peters' response was in the negative. The randomly selected employees interviewed by the mediator indicated they noticed no increase in the number of managers in the crew lounges during the months in question.

B.

ALPA also contends that the carrier indirectly polled employees "by thanking eligible voters for their calls of support to Frederick Smith." The organization cites three letters sent by the carrier between March 1991 and August 1991, in support of its contention.

[19]On March 25, 1991, Smith wrote a "Red Letter" to "All Crewmembers" entitled "Efforts to Organize". After asking employees to compare the carrier's PSP (People Service Profit) system to "the traditional union environment", Smith closed with the following statement:

> To those of you who have called to say you continue to remain committed to me and to our PSP philosophy, I thank you. Your commitment is deeply appreciated.

In Barksdale's June 16, 1991 letter he stated, "Fred and I continue to appreciate the calls of support."

On August 6, 1991, Barksdale wrote a letter to "all crewmembers" entitled "Comparing Apples to Apples", in which the postscript was:

As the representation election begins to draw to a close, I want to convey my deepest appreciation for the extreme patience and support you have shown throughout.

Although it has provided no evidence in support of its position on this issue, the carrier maintains that "Federal Express management has always attempted to be available to its employees". Federal Express states further that "many employees...have routinely communicated directly to Fred Smith,... [and] Barksdale." The carrier argues that the organization's contention that its "expressions of appreciation" constitute indirect polling indicates "just how strained ALPA's claims of carrier interference are...".

III.

Address List

ALPA argues that Federal Express undermined the election by deliberately providing the Board with an inaccurate address list. According to the [20]organization, there are two types of address lists used at Federal Express. One, known as the PRISM list (Personnel Information System) was the basis for the labels used in the election. ALPA asserts that the PRISM list is not as accurate as the "Powership" list, which is used by the carrier's Flight Operations Department to send "time-sensitive materials." The carrier does not dispute that it used the "Powership" list to mail campaign material. In fact, all the carrier campaign materials were sent using labels generated by the "Powership" data base.

Several pilots have submitted affidavits in support of ALPA's position on this issue. Two individuals stated that all of the campaign communications sent by the carrier and "Federal Express Pilots for a Non-Union Operation (NO)" to them were received at their out of state residences. Their ballots were sent to a rental apartment in one case, and a post office box in the other instance. Another individual, who has moved several times since 1985, received his ballot at an address where he has not resided since 1985. All Federal Express communications and NO communications were sent to this individual's current address.

ALPA takes the position that by providing the Board with "valid second addresses" the carrier accomplished two purposes. According to the organization, the carrier's actions influenced "the actual vote tally" and led pilots to believe that Federal Express could manipulate the election.

According to the carrier, the list of potential eligible voters was generated from the PRISM list. When Mediator Piculin inquired about a different list for ballot mailing, the carrier informed her of the "Powership" list. The carrier further informed the mediator that the "Powership" list was not in alphabetical order, and included Federal Express employees who were not eligible voters, such as "members of flight management, employees in Crew Scheduling, Personnel Services, and others...who regularly receive copies of various materials sent to flight crewmembers." The carrier assigned two employees to review the "Powership" list to ensure it [21] accurately reflected the list of eligible voters. According to an affidavit submitted by Federal Express Senior Attorney Rush O'Keefe,

> After working for four hours, [the two employees] had been able to complete only approximately four pages of the forty-four page Powership list. I then called Ms. Piculin, and advised her of the estimated time it would take to complete the verification process. I again told Ms. Piculin that the PRISM list was available. Ms. Piculin advised me that she would check with ALPA and let me know which list was acceptable. Ms. Piculin called me a short time thereafter, and advised me that the PRISM list would be acceptable to ALPA and the Board.

The carrier also asserts that its campaign materials were sent using the "Powership" list because the "Powership" list could generate overnight delivery labels.

The carrier has also submitted a portion of its Personnel Policy & Procedure Manual as evidence in support of its contention that the PRISM list contains personal data including "home address, home telephone number, emergency data." According to Section

10-10 of the Manual, this information is reviewed on a semi-annual basis. The carrier maintains that in contrast, "pilots are free to list whatever address they choose on the Powership list...".

In ALPA's December 20, 1991, reply to Federal Express' response, the organization asserts that no ALPA representative acceded to the use of the PRISM list for ballot-mailing purposes.

During the election period, the Board received approximately 30 requests for duplicate ballots, out of 2279 eligible voters, all of which were processed [22]in a timely manner. As of the date of the count, the Board had received only one "undeliverable" ballot.

IV.

Assisting the "NO" Group

The organization contends that the carrier provided assistance and endorsed the efforts of the NO group. According to ALPA, Federal Express provided the NO group "with pilot addresses and assisted the group in distributing its materials to pilots throughout the Federal system." As evidence of this allegation, ALPA has submitted affidavits from individuals stating that they received mailings from NO at the same address as Federal Express mailings. Two other pilots have submitted affidavits in support of ALPA's contention that "management employees actively participated in the distribution of NO materials." One of those individuals states that in mid-June 1991, he found NO materials next to carrier documents on a table in the Indianapolis crew lounge. The NO materials had apparently arrived with a facsimile from the "Pilots for a Non Union Operation" instructing the recipient to distribute the materials. The second individual states that in late July 1991 he was in the Los Angeles crew room when Flight Manager Doug Hap's secretary placed NO materials on a table "next to Company bulletins and information that pilots are expected to read".

ALPA also argues that "there is a suspicious similarity in the green ink used to print several Federal and NO documents." The organization requested the Board to investigate where the documents

were printed as well as "the identity of the individuals who obtained and paid for the postage permit used to mail NO materials.

ALPA's final argument on the issue of the NO group is that the NO literature contains false information and exhorted employees to " 'tear up the ballots' ". According to ALPA, the carrier's "apparent approval of these misstatements and exhortations also tainted the laboratory conditions."

[23]The carrier denies providing NO with an employee address list or aiding in distribution of NO's literature. Federal Express has submitted affidavits from Richard Mistretto, Senior Manager, Flight Operations Administration, and Timothy Sorrells, Flight Crewmember Handbook Specialist-Flight Administration. Mistretta's department is responsible for maintaining the pilot address list. Mistretta asserts that no one from NO or ALPA ever requested or received an address list. Sorrells, who is actually responsible for "handling all requests" for the address list also states that neither ALPA nor NO ever requested or received a copy of the list. Sorrells further states that "there are approximately 40 copies of the list circulated within Federal Express' Air Operations Division." In addition, Sorrells states that the "Pilots' Wives Association" has been provided with mailing labels.

William Cima, one of the founders of NO, provided an affidavit and was interviewed by Mediator Piculin. Cima maintains that NO did not receive any assistance from the carrier. The mediator asked Cima where the NO literature was printed and who paid for the postage. Cima responded that the materials were printed by two different printers, one in Memphis, and one in Oceanside, California. (Federal Express' printing facility is located at the Memphis International Airport Complex). NO used the second printer's postage permit. According to Cima, NO's effort were funded solely by contributions from pilots. As for the green ink, Cima states,

> ...we used green ink because we wanted to draw attention. We wanted to set ourselves apart. When something showed up for [the pilots] in the mail, we wanted them to

see immediately its green ink so it must be from the NO group.

Cima told the mediator he received the pilots' addresses from Mark Lombardo. Lombardo whom the mediator also interviewed, was the founder of UFO, Pilots for Union Free Organization, which was active in the 1989 election among Federal Express' Flight [24] Deck Crew Members.[5] Lombardo informed the mediator that he had received the list from another [unidentified] member of UFO.

In ALPA's December 20, 1991 reply, the organization asserts that the carrier actively participated in the distribution of NO literature through the carrier's COMAT (mail) system; but prevented ALPA material from being distributed. ALPA has submitted affidavits from several employees who admit receiving and distributing NO literature. The carrier does not deny that employees used the COMAT (mail) system for distribution of NO literature, but maintains that the employees also distributed ALPA literature. The carrier, in addition, has submitted statements from Federal Express managers who, for the most part, deny removing ALPA literature from crew lounges.

V.

Pre-empting ALPA's Negotiating Role

A.

ALPA maintains that the carrier pre-empted the organization's potential bargaining role through the establishment of a permanent scope committee several weeks before the count. On August 6, 1991, the FAB (Flight Advisory Board) issued a memorandum asking for volunteers

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[5] In Federal Express/Flying Tiger, 16 NMB 433, (1989), the Board authorized an election with ALPA, the representative of Flying Tiger's Pilots and Co-Pilots, on the ballot. ALPA did not receive enough votes for certification.

> ...to staff a permanent committee dealing with Scope Clause issues, Fifth Freedom Rights, and Domestic/International Feeder Operations. Mr. Barksdale has called for the formation of a Scope Committee with representatives from the FAB, Flight [25]Management, the Legal Department and Feeder Operations. The purpose is to establish a group of 'experts' to deal with future Scope issues and examine Fifth Freedom Rights. FAB representation will be a free standing committee consisting of three pilots from the Master Seniority List and one elected FAB member. Any interested pilots please contact the FAB office. Individuals serving on this committee will receive comp time or Special Projects pay.

The first Scope committee meeting was held August 16, 1991. According to ALPA, Scope issues would be "of paramount importance" in collective bargaining. Therefore, by establishing and publicizing the committee Federal Express "sought to preempt the issue and convey the ...message to the pilots that they don't need a union...."

According to the carrier, Federal Express has a history of forming committees to deal with specific issues. The carrier also maintains that such committees do not negotiate with the carrier.

B.

Section 4-77 of the carrier's Flight Crewmembers Handbook (FCH) addresses the use of feeder or contract air operations as follows:

> A. Revenue Trips
>
> All revenue Flights conducted with aircraft owned, leased, or operated by Federal Express having an MTOGW (Maximum Take Off Gross Weight) of 50,000 pounds or greater will be scheduled and operated according to the provisions of the FCH. No one other than a Crewmember listed on the Master Seniority List will be Assigned to

occupy a Crew Position during such Flights or during positioning to or from such operations. The provisions of this paragraph apply to all Company operations world-wide.

[26]This section means that the carrier may use non-employees (feeder or contract air employees), if the aircraft is under 50,000 lbs MTOGW. The limits specified in bilateral agreements often mean that the carrier is "not free to carry freight to, through, out of, or beyond specified countries." (For example, Federal Express is prohibited from operating any aircraft in Canada using Federal Express crews).

According to the carrier, "crewmembers became irritated because of the growth in the number of exceptions to FCH Section 4-77" as the result of the merger with Flying Tiger in 1989. Barksdale told the mediator that the merger with Flying Tiger created route authority problems because the pre-merger Federal Express was primarily a domestic carrier whereas Flying Tiger had complex international routes. Since the merger, Several pilots and members of flight management had expressed concerns and confusion over international route authority. Barksdale suggested the formation of a committee:

> ...like we had done in many other issues of communication, we set up a committee and it would be composed of those who had a vested interest in flying these new routes....I'll get people with a vested interest in it and I'll get the regulatory attorneys on the other side any time you think that the company is not adhering to its scope, I want you to raise your hand and get the lawyers to give you a definitive answer....

The mediator also interviewed James McKinney, Vice President of Flight Operations. McKinney also told the mediator that the merger created complex issues because of the

> ...first through fifth freedoms for the airlines....there are international laws....bi-lateral treaties negotiated between

> the U.S. and all these different countries. They are very complex... We have an agreement with our pilots, in our work rules, that if we can fly the freight on a purple airplane, we in fact will do [27]something like that. If we are not going to do that, we'll get together and explain to them what's going on.... I, quite frankly, never truly did figure it all out. So we came up with the idea, let's go for a permanent scope committee..... Barksdale and I were talking back and forth....I explained to him, look I honestly don't have time to do it, we need to get the lawyers involved, somebody who understands what our rights actually are. We need to get pilots involved, just a basic line pilot so they can figure out that we're not trying to pull the wool over anybody's eyes. And...a member of flight management....In an effort to try to get a standing committee of people that were familiar with and used to working with our bi-lateral agreements with these countries.

In its December 20, 1991 response, ALPA contends that the scope committee formed in August 1991 differed from other carrier committees in more than one respect. According to the organization, most Federal Express committees do not consist of members of management and are not "permanent." In addition ALPA asserts that most committee members are not compensated. ALPA maintains that the timing of the announcement and the formation of the scope committee were intended to influence voters.

In the carrier's January 15, 1992 submission, Federal Express contends that the scope committee became necessary in 1991 because the carrier's transition from being an international air freight carrier, as it was pre-merger, to an "international time definite integrated 'express' carrier", took place in 1991. The carrier also points out that it has been using scope committees since 1988. Additionally, the carrier asserts that "employees who serve on committees are often protected against loss of pay."

[28]VI.

Carrier Campaign Communications

The carrier issued over 50 written communications to pilots between March and August 1991. ALPA asserts that the carrier's campaign literature influenced and coerced employees, and contained misrepresentations about ALPA.

A.

The organization cites as an "egregious example" of the carrier's attempt to misinform and intimidate pilots, the July 12, 1991 "Red Letter" sent by Frederick Smith. ("Red Letters" are used for "critical communications"). The subject of the letter was "A Time of Decision."

> I told you on March 25 that I didn't plan to get involved in any political campaign. But after reading much of the ALPA campaign material and listening to all the other things that the Company has been accused of, I want you to know that there is only one person who is ultimately responsible for everything that happens at Federal Express.

That person is Frederick Wallace Smith.

> I am responsible for making the tough, unpopular decisions necessary to safeguard our long-term competitive position and your long-term job security. I am also responsible for our apparent failure to clearly explain the linkage between these decisions and the security they were designed to provide. While our commitment to job security may not seem remarkable during our good years, I can assure you it is something we work hard to protect during the tough ones.

> [29]The unparalleled job security Federal Express pilots have enjoyed over the years is a result of our P-S-P

(People-Service-Profit) philosophy. ....Our record of job security is the best evidence you have of just how successfully P-S-P works for you and your families.

.... As a student of business history I believe that life after ALPA could include life with the IAM and the Teamsters as well. If mediocrity and acrimony follow, I believe it will be incredibly difficult to compete....

And if you don't believe corporate strife and mediocre service can lead to the corporate graveyard, ask some former Eastern employees to tell you about it.

....You should vote for ALPA if you truly believe that Captain Babbitt (or whomever future leadership would be), has earned more of a right to lead you than I have.

....When a ballot is placed in your hands I hope you'll think of it.

The organization asserts that this letter was coercive and contained "distortions of the purposes and effects of the Board's processes...".

The carrier maintains that its campaign communications, including Smith's July 12, 1991, letter were designed to "educate the crew force about ALPA" and were in response to the organization's "misrepresentations." According to Federal Express, the July 12 memorandum "was a personal response...to the barrage of claims...by ALPA that...'management' had somehow compromised, revoked or usurped virtually every positive aspect of being a Federal Express crewmember." The carrier has cited examples of ALPA campaign literature in support of its position.

[30]The carrier also disputes ALPA's allegation that Smith's letter was coercive because he stated that unionization would adversely affect the carrier's ability to compete.

According to ALPA, the "Red Letters" sent by Smith "implied that Federal's financial future rested on the employees rejection of union representation". The organization has provided copies of these letters in support of its contentions. For example, in Smith's letter of March 25, 1991, ALPA points to such phases as "[ALPA] couldn't have picked a worse time from the Company's perspective." In Smith's July 12 letter, ALPA cites such phrases as "corporate graveyard", "mediocrity and acrimony" and "ask some former Eastern employees" as evidence of "predictions of the dire economic consequences that would result from unionization."

B.

ALPA argues that the carrier engaged in a pattern of misrepresentation about the organization in its campaign literature. One such alleged misrepresentation involved dues. A carrier pamphlet issued June 14, 1991, entitled "Critical Reading for Former and Prospective ALPA Members" included a letter from a Flying Tiger MEC Chairman to former Flying Tiger pilots regarding payment of dues. Federal Express provided the following commentary:

> **One way or another, <u>you are going to pay</u>.**
>
> It was with irony that we read the ALPA's organizer's comments...that you may expect threats from the Company now that the Company is beginning to state its position on the organizing effort.
>
> The irony is there because ALPA, in one single communication about dues, threatened some Federal Express crewmember with legal action, cancellation of insurance, jumpseat blacklisting, court costs and additional personal expense.
>
> [31] ....You should also read ALPA's constitution and by-laws carefully. If you have been a former ALPA member and plan to be a member again in the near future, ALPA says it will require you to pay all assessments and dues that you would have paid if you had been an ALPA

> member all along. **So, if you've been away from ALPA for two years, for example, ALPA says it will require you to catch up on two years of dues and assessments...** We encourage you to get a copy and study the ALPA constitution and by-laws.... below you'll see the verbatim quote on this subject.... (Emphasis in original)

The carrier provided an excerpt from ALPA's Constitution and By-Laws Article II, Section 4 (e)(5).

Article II, Section 4 (e)(5) states:

> Any former member who has been approved for membership in accordance with the provisions of this Paragraph E of this Section shall become a member in good standing upon payment of all of his outstanding indebtedness to ALPA as of the time his former membership ceased; in addition, he shall be required to pay an amount equal to the sum total of all dues and assessments he would have paid as an active member in good standing, from the time of termination of his former membership until the time of his membership reinstatement....

ALPA maintains that the carrier's June 14 letter is a "blatant falsehood". Citing Article II Section 3, A of its Constitution and By-Laws, ALPA asserts that pilots who work for a non-ALPA carrier are not subject to dues during that time.

The carrier states that its letter was in response to letters sent to certain former Flying Tiger employees by ALPA and denies that its statements [32]about dues obligations were erroneous. According to the carrier, the "pamphlet was based ... upon a reasonable reading of ALPA's Constitution and By-Laws." After the merger with Flying Tiger, some former members of ALPA received bills from ALPA for dues and assessments. The carrier learned that former Flying Tiger pilots had been classified as "Inactive", and found a provision in ALPA's Constitution dealing with the dues obligations of "inactive" members. Federal Express maintains that its reading of Section 4(e)(5) led it to conclude that if ALPA were

elected, certain pilots would be affected. The carrier adds that ALPA promptly disputed the carrier's June 14 pamphlet in a letter issued on June 18 and on a taped message.

In its December 20, 1991 reply brief, ALPA argues that a "good faith" belief does not mitigate the taint of laboratory conditions caused by inaccurate statements.

C.

ALPA also maintains that the carrier misrepresented the amount of money pilots would " 'lose' by paying ALPA dues instead of investing the funds in a 'tax-deferred account at eight percent annual interest compounded semi-monthly'." The organization argues that the carrier communication containing this statement "fails to mention that the pilots would be extremely hard-pressed to find such a favorable investment opportunity."

The communication distributed by the carrier on the issue of dues obligation was entitled "The Cost of ALPA" and consisted of a chart comparing ALPA dues at 2.35% of total airline income with money invested in a tax-deferred account paying 8% annual interest compounded semi-monthly for purposes of determining money available at retirement.

In response, the carrier asserts that an 8% rate of return is reasonable, and has submitted a "list of 50 such investment opportunities."

[33]D.

As another example of carrier campaign misrepresentations, ALPA cites a postcard issued by Federal Express entitled "Wake-Up Call." According to ALPA, the postcard raised the question, "Is ALPA really democratic and locally controlled?" The carrier's response:

> Under [ALPA's Constitution and By-Laws] the Master Executive Council (MEC) can decide against pilot mem-

> bership ratification of any collective bargaining 'contract, letter of agreement or letter of understanding that, in the opinion of the MEC, substantially affects the pay, working conditions, retirement or career security of member pilots...'.

ALPA contends that the postcard is "deceptive" because it "fails to mention that an MEC is ...a democratically elected body." The organization further points out that the carrier's postcard failed to mention several limitations on MEC power.

In response, the carrier asserts that the statements contained in the postcard were true.

ALPA's final submission on this issue is that the carrier left out "crucial language from a quoted portion of ALPA's Constitution."

E.

ALPA alleges that the carrier misrepresented ALPA's oversight of the Eastern Airlines B-Plan. According to the organization on July 30, 1992 the carrier issued a "Memorandum ... which falsely attribute[d] to ALPA problems with the pilots' B-Fund (the defined contribution plan) at Eastern Airlines."

The pertinent language, contained in a letter from Federal Express Senior Vice President of Personnel, James Perkins, is as follows:

> [34]...ALPA/pilot oversight does not guarantee protection of your retirement funds. A case in point would be the Eastern 'B' fund, where ALPA appointed and monitored the Trust Administration Committee that managed the fund's investments. IF ALPA oversight provides as much protection as you imply, then why is there a moratorium preventing former Eastern pilots from receiving their lump sum benefits.

The "you" referred to in Perkins' letter is Federal Express pilot Richard Kingston, who, according to the carrier, had initiated correspondence with Perkins on June 15, 1991 on the subject of pensions. Perkins had responded on July 2, and Kingston replied on July 16, 1991.

ALPA objects to Perkins' July 30 statement on the grounds that ALPA's oversight of the Eastern B-Plan bore no relation to the moratorium on lump sum benefits. The organization asserts that ALPA "does not and never did appoint the Trust Administrative Committee that manage[d] the B-Plan assets at Eastern." ALPA further states that while it nominated a minority of the Committee members, the majority were independent.

According to an affidavit submitted by August C. Lauer, Senior Manager of Employee Benefits, before Perkins' July 30 letter was issued, Lauer contacted "a high-ranking management executive at Eastern ... [with] extensive knowledge of..." Eastern's B-plan.

According to Lauer, the Eastern employee informed him that:

> The Trust Administration Committee at Eastern was made up of seven (7) individuals two (2) of the seven (7) members of that committee were selected by ALPA. The remaining five (5) members were outsiders who had to be confirmed by ALPA's Eastern Airlines MEC.

[35]VII.

Furlough Threats

A.

ALPA asserts that the carrier threatened to furlough hundreds of pilots if they voted for union representation. In support of its contentions on this issue, ALPA has submitted declarations from several individuals concerning various remarks attributed to Flight Manager Sam Davis. Mediator Piculin interviewed several individuals including Davis concerning this issue.

According to four individuals, in mid-March, during ALPA's organization drive, Davis began discussing furloughs in the Memphis crew lounge. James Camp has submitted a declaration and was interviewed by the Mediator regarding this incident. Camp stated in his declaration as follows:

> I was talking to several other ... pilots when I heard Sam Davis speaking in a loud voice. He was standing approximately ten to twelve feet away from me talking to several other ... pilots. There were approximately six to eight additional...pilots standing between me and Sam Davis. I heard Davis say that ALPA was really going to cause problems in the crew force because it was going to create a lot of furloughs. He also said "if ALPA gets elected there will be furloughs." He stated the number of pilots that would be furloughed, which was in the hundreds, but I don't recall the precise number. Shortly thereafter, Captain Jack Burke, a member of the Organizing Committee, approached Davis and advised him that he couldn't threaten pilots with furloughs for supporting ALPA. Davis responded, I'll say anything I want." and added, 'I answer to a higher authority.' I would estimate that at least twenty pilots were within earshot of Davis [36]when he made all of these remarks.

Burke has submitted a declaration confirming Camp's statements.

Eric Vartanian, Chairman of the Federal Express Pilots Organizing Committee also has submitted a declaration concerning Davis' statements. According to Vartanian, he participated in a discussion with Davis although he does

> ...not recall who initiated the conversation. Don Grant, another member of the organizing committee, was standing next to us. During the discussion, Sam Davis said that Federal had an excess of pilots and that if ALPA were elected then pilots would be furloughed. He stated the

number of pilots that would be furloughed which was in the hundreds but I don't recall the precise number.

Another individual has submitted a declaration about a conversation he had with Davis, also sometime in mid-March 1991. This individual was also interviewed by the mediator. According to this individual, known as Declarant "A", he went to Davis' office to discuss the possibility of jobs as Pilots for friends of his. "A" states in his declaration:

> ... I asked [Davis] about projected hiring, ...Davis...said that all of this will be affected by unions. I said I don't know much about unions. Davis then asked me 'What's your seniority number?' I responded. He then told me that if we end up with a union on this property 'that will get very personal to you' and that we'll furlough you and people like you.

Declarant "B" has submitted a statement regarding a conversation he had with Davis during the spring of 1991. According to "B", he asked Davis "whether he had been telling pilots "that there would be furloughs if ALPA were elected. "B" states that Davis replied, " 'yes, that's true'."

[37]The organization contends that Davis' comments had a major impact on junior pilots because "of the position he held within the Company." According to the organization, "Davis' role in hiring the junior pilots" put him in a position to be taken seriously by those pilots.

Organizing Committee member Robert Donald Wilson has submitted a declaration stating that "at some point in time between mid-April and the end of May" of 1991, he was having a discussion with Chief Pilot Bob Sparkman, about FCH violations. According to Wilson, Davis joined the conversation. Wilson states:

> During the ...discussion, I told them that I thought it was obvious that we needed a contract because the FCH was not working and I added that I expect the problem would

be clarified in the future, implying that ALPA would win the election.
Sam Davis became angry and said that 'if ALPA gets in here' ...there are going to be 'people on the street.' When I pointed out that the Company doesn't put people on the street because they have a reassignment policy, Davis said that we already have too many pilots and that its only because a union isn't in here that we have a no-furlough policy. At one point in the conversation, I said that I don't think there will be a furlough. Sparkman said you may not believe it but Mr. Smith believes it. When I then pointed out that there aren't even enough training slots to downgrade all the pilots who would be re-assigned as a result of a furlough, Sparkman replied 'I thought you were smarter than that' and added that he hoped I was 'prepared to tell that to all the people that will be furloughed.'

[38]Wilson also asserts that Pilot Mark Lombardo told him that 'if ALPA won, he had it on word from Jim Barksdale that 600 to 700 pilots would be furloughed...".

Several other individuals have submitted declarations recounting conversations held with other employees who said they had been threatened with furlough by Davis or who were worried that they would be furloughed if ALPA won the election. Another individual, Declarant "C", states he spoke with an individual who had a conversation with Flight Manager Charles Nanney. According to "C", Nanney had told the employee that the carrier had already drawn up plans to furlough 600 pilots if a union gets on the property."

B.

The carrier disputes ALPA's description of Davis' responsibilities particularly with respect to hiring. According to Federal Express, its Flight Managers are pilots "who come off the line for a management stint and then return to line flying...". These

individuals "regularly rotate back to the flight line ...and occasionally to fly the line."

As stated previously, Davis submitted an affidavit and was interviewed by the mediator. In his affidavit, Davis described his responsibilities as follows: "...screening, selection, interviewing and processing of pilot hiring."

Davis denies discussing furloughs at any time other than his March 14 or 15, 1991 conversation with Vartanian, Grant and Everett Hicks. Davis asserts that he was in the crew lounge that day because he was flying a trip. According to Davis, there were approximately 24 people in the lounge. Vartanian, who was distributing authorization cards approached Davis and Hicks and asked about the carrier's hiring plans. Davis' response:

> I explained that during the winter of 1990 we were projecting hiring some 280 pilots [39]for 1991...Federal Express continued to hire pilots from the pilot pool because the projections indicated that we would need pilots in 1991.
>
> In March 1991,...hiring stopped because the hiring outlook changed drastically...because of the retirement of the 747-100 airplanes and the...recession....Federal Express was now projecting an excess of 300 pilots. ....I shared...my concern that we now had an excess of some 200 pilots.

Davis denies linking the election of ALPA with the possibility of furloughs, but admits stating " 'if I was in the bottom 200 pilots, I'd be concerned' ". Davis also recalls a subsequent conversation with Vartanian during which the latter warned Davis about discussing furloughs. According to Davis, it was during the second conversation with Vartanian that Davis stated he answered to a higher authority. Davis told the mediator that the "higher authority" was "management."

Davis states further that a few days later at a briefing conducted by Donald Maliniak, of the carrier's Legal Department, Federal Express managers were told what they "could and could not say during an election campaign." According to Davis,

> after that meeting I knew that Eric's advice had been correct and when I commented on the furlough or excess issue I told pilots who asked me that they should weigh the no furlough policy...to what they felt ALPA could negotiate and to decide for themselves what they wanted to do.

Davis denies a number of the other allegations concerning him. He denies conversing with Burke and Camp, and denies the assertions of Declarants "A", "B" and "C". As to Wilson's assertions regarding the conversation with himself and Sparkman, Davis admits "engaging in a lengthy discussion...on the ALPA campaign....and the need for a "B" type pension plan" [40]but asserts that he has no recollection of "any discussion about furloughs. Since we were very senior...we would be unaffected by whatever ALPA negotiated...."

Sparkman also has submitted an affidavit denying that he discussed furloughs with Wilson and Davis. Nanney has also submitted an affidavit and was interviewed by the mediator. Nanney acknowledges discussing the issue of furloughs in response to questions from pilots. According to Nanney, he told the pilots that there was no reason to expect furloughs.

As stated previously, in response to ALPA's allegations that several Federal Express managers were observed in the crew lounges more frequently than usual during the months of the campaign, various managers have submitted affidavits denying that their presence in the crew lounges was for the purpose of discussing ALPA. Davis, however, admits to more frequent visits to the Memphis crew lounge "because [of] ... reports that Jack Burke and David Webb...were telling pilots that the company was interviewing pilots...[and looking for] people who couldn't think for themselves." Davis states that he "felt an obligation to" correct these falsehoods."

C.

On April 4, 1991, Vice President of Flight Operations McKinney sent a memorandum to all crewmembers, the subject of which was "Furlough Rumor". The memorandum stated in part, as follows:

> I've been told there is a rumor going around that we are planning to furlough crewmembers. There is no truth to it. On the contrary, everything we are doing as a Company to control costs and increase system efficiency is designed to avoid furloughs.
>
> If the current volume forecasts for the next 12-18 months hold true, we will indeed be overmanned in some seats. However, ... [41]we intend to run a little heavy on those seats so that we are prepared to move quickly in response to an upsurge of volume.... If we intended to furlough, or were only concerned with short term cost savings, we would be excessing hundreds of crewmembers into the lower seats instead of carrying those overages....
>
> Please bear in mind that the rumor mill tends to work overtime during periods of uncertainty.... Please be very skeptical of the rumor mill.

D.

ALPA also argues that the furlough threats made by managers were "reinforced" by the carrier's campaign literature. The organization cites several examples in support of its position on this issue. In June pilots received a postcard asking "Will Your Job Security be Enhanced by the Presence of ALPA? The postcard continued,

> ...Federal Express' record on pilot employment and termination under its P-S-P philosophy is an open book.
>
> ALPA's record on this subject is an open book too.

> **Are you sure the grass is greener on ALPA's side of the fence?** (Emphasis in original).

Another example cited by ALPA is Barksdale's letter of June 16, 1991. Part of that letter addressed job security; "There's no way for you to know with certainty what effect ALPA representation might have on your pay, benefits, workrules, job security...". The letter also stated;

> ALPA representation CAN'T GUARANTEE job security for Federal Express pilots. The plainly stated truth is this: most ALPA contracts allow for furloughs. Could it be that, when push came to shove during [42]negotiations, the job security of junior pilots was not that high on ALPA's priority list?
>
> The question is relevant considering the number of pilots currently on furlough from ALPA carriers. That's living proof - one of the few indisputable facts that you have to go on in the jumble of rhetoric and quasi-promises from ALPA.

Similarly, ALPA cites Smith's "Red Letter" of July 12.

Another postcard was issued in July, 1991, asking the questions, "Do ALPA contracts ensure job security"? "How many ALPA members are currently on furlough?", and "What is the average length of time that those pilots have been on furlough?" Between mid-July and mid-August another document, entitled, "The Questions Posed But Never Answered By ALPA Or The Organizing Committee", was sent to crewmembers. This communication included the last two questions on the postcard discussed above.

The organization asserts that support for ALPA "eroded as a direct result of the furlough threats."

In response, the carrier maintains that the communications discussed above merely "reemphasize that Federal Express has provided its pilots with unparalled job security in an airline industry

that has a history of furloughs." Federal Express states that it has never furloughed U.S. employees, and that it has made numerous statements that it will not furlough "except as a last resort". The carrier also contends that its communications were in response to ALPA's position that pilots needed a written contract, to provide certain guarantees, such as job security.

According to Federal Express, Smith's "Red Letters" were not coercive, but were merely expressions of opinion. In addition, the carrier asserts that "Smith has a First Amendment right to express his opinion just like members of the crew force..."

[43]In ALPA's final submission, the organization argues that the carrier has failed to rebut the organization's evidence of furlough threats. The organization refers to as evidence of this assertion a January 3, 1991, article written by Smith and distributed to all pilots, in which Smith discussed the possibility of furloughing employees in the carrier's international operations, who are covered by collective bargaining agreements which include furlough provisions.

DISCUSSION

I.

In cases involving the issue of carrier interference, including the allegations raised in the present case, the Board examines the question of whether the laboratory conditions essential to representation elections have been tainted. The Board makes its determinations in accordance with the requirements of the Railway Labor Act. Past cases include Emery Air Charter, 19 NMB 337 (1992), Egyptair, 19 NMB 166 (1992), Metroflight, 18 NMB 532 (1991), USAir, 17 NMB 377 (1990), Florida East Coast Railway, 17 NMB 177 (1990), Key Airlines, 13 NMB 153 (1986), Laker Airways, Ltd., 8 NMB 236 (1981), and Zantop International Airlines, 6 NMB 834 (1979).

The Board examines the totality of the circumstances in each case to determine whether the carrier's actions have tainted the

laboratory conditions. USAir, supra, America West Airlines, Inc., 17 NMB 79 (1990). In so doing, the Board relies upon the evidence and arguments submitted by the organization and the carrier, the mediator's investigation and interviews, and past Board determinations.

ALPA has requested a re-run election using a "Key" ballot. In Florida East Coast Railway, supra, the Board cited Key Airlines, 16 NMB 296 (1989) in noting "its broad discretion in fashioning appropriate remedies for carrier interference", pursuant to Section 2, Ninth, of the Act. The Board has ordered various remedies in cases where it finds interference. **[44]**These remedies are intended to eliminate the taint of interference on the election. Remedies are fashioned in accord with the extent of the carrier interference found. One such remedy is the "Key" ballot. In a "Key" election the organization is certified unless a majority of eligible voters returns votes opposing union representation. No write-in space is provided. Another remedy is a "Laker" ballot. A "Laker" election involves the use of a "yes" or "no" ballot. No write-in space is provided, and the majority of votes actually cast determines the outcome of the election.

In Key, the Board found that the carrier had violated its employees' right to freedom of choice by engaging in such activities as: discharging and reassigning leading union organizers; denying a scheduled pay increase to employees in one craft or class immediately after a representation application was filed, but granting an increase to another craft or class immediately before a representation application was filed; holding meetings for the express purpose of discouraging organization; and threatening employees' job security should they vote for representation. The carrier also issued letters criticizing the organization (IBT). Significantly, the Board had found that the carrier had violated employee representation rights in a similar manner three years previously.

In Laker Airways, supra, the Board found that the carrier had violated the Act by: soliciting employees to turn in their ballots to carrier officials; increasing pay immediately before the election period; and polling employees as to their representation choice. As

a remedy, the Board ordered a re-run election using a "Laker" ballot. A "Laker" election has been used as a remedy in other cases, such as Mid Pacific Airlines, 13 NMB 178 (1988), where the Board found the carrier had violated the Act by polling its employees and by implying that its financial future hinged on the employees rejecting union representation.

There have been a number of cases in which the Board has found the level of interference does not [45]warrant remedies such as "Key" or "Laker" elections. The Board has ordered a re-run election using its standard ballot procedures and a special notice in such cases as USAir, 17 NMB 377 (1990); Florida East Coast Railway; supra, and America West, supra. In Zantop International Airlines, supra, the Board also ordered a standard re-run election. There the carrier had misinformed its employees of the Board's voting procedures and held meetings with small groups of employees in which the election and unionization were discussed.

There also have been interference cases in which the Board has found no basis for taking remedial action. For example, in USAir, 18 NMB 290 (1991), the Board found that although there were isolated objectionable incidents, the carrier did not engage in a "systematic" effort to interfere in an election. More recently in Northwest Airlines, 19 NMB 94 (1991), the Board found that with the exception of isolated incidents involving supervisory employees, carrier officials did little to interfere in an election involving two organizations. See, also, Northwest Airlines, 13 NMB 399 (1986) and 14 NMB 49 (1986), where the Board found "no pattern of carrier interference" despite the fact that one organization apparently campaigned in crew lounges while another was denied access.

II.

Promise or Conferral of Benefits

ALPA argues that Federal Express engaged in a pattern of coercive conduct which interfered with its employees' freedom of choice of representative. The organization cites several previous

Board determinations as well as judicial decisions in support of its position.

Board cases which deal with the issue of promise or conferral of benefits include Key, supra, and America West, supra. In Key, the Board found that the carrier used pay increases (or denial of scheduled increases) in an attempt to influence the outcome of the election. In America West, the Board found that [46]the carrier had not established an historical pattern of providing certain benefits, and that instead, its actions were timed to influence the outcome of the election.

In its 1990 USAir decision, the Board found that certain benefits and pay increases implemented during the election period were either previously scheduled or part of an historical pattern. In the instant case, the Board also finds that the carrier did not promise or confer benefits in order to interfere with the election. The Board's review of the record reveals that the American Airlines jumpseat agreement was the result of several months of negotiations, and the announcement of the agreement was made in the regular course of business. Similarly, the Board finds that the carrier's announcement of widebody pay for the A-300 was not an unusual benefit designed to influence the outcome of the election.

ALPA argues that the carrier used the pending Pension Simplification Bill "as a vehicle to tell pilots that they should reject ALPA because Congress, at Federal's request..." would change the law.

The Board finds that Federal Express' lobbying efforts and support for legislative changes affecting pilots' pensions preceded by several months ALPA's organizational drive. There is insufficient evidence based upon a review of the campaign communications on this issue that the carrier was promising, implicitly or otherwise, improvement in pension benefits in exchange for rejecting ALPA.

III.

Surveillance and Polling

Although ALPA asserts that Federal Express "flooded the crowded Memphis crew lounge" with managers between March and August, the Board's investigation did not adduce substantial evidence to that effect. With the exception of Sam Davis, the carrier's flight managers deny either making more frequent visits to the crew lounges or a correlation between their presence in the crew lounges and the [47]campaign. The randomly selected employees interviewed by the mediator and the flight duty manager told the mediator they did not notice an increased presence of managers in the crew lounges during the pertinent period. There is also insufficient evidence that the meetings held by Smith and Barksdale were used to discuss the election.

The carrier letters cited by ALPA in support of its allegation that the carrier engaged in indirect polling are not sufficient to support a finding of interference. As with the issue of surveillance, none of the randomly selected employees interviewed by the mediator perceived any attempt on the part of the carrier to ascertain their position on the election.

IV.

Address List

The carrier has presented evidence that the PRISM list, used in the election, contained addresses which the carrier believed to be accurate home addresses. Employees are responsible for informing the carrier of their correct addresses. Although ALPA asserts that the organization received over 150 duplicate ballot requests, the Board itself received approximately 30 such requests. ALPA has not provided sufficient evidence either that the PRISM list was

inaccurate, or that the carrier deliberately provided labels from the PRISM list to undermine the election.[6]

V.

Assisting the NO Group

There is also insufficient evidence that the carrier assisted or endorsed the efforts of the NO group. Based upon the evidence submitted by ALPA and [48]the carrier, as well as the mediator's interviews, the Board finds no evidence other than that the NO group was an independent entity funded by pilots. There is no evidence that the NO materials were printed by Federal Express. There is also no evidence that the carrier provided the NO group with an address list. It is clear from the record that it is possible to obtain Federal Express employee addresses from a number of sources. Finally, there is no evidence that the carrier was responsible for any misrepresentations made by the NO group in its communications.

The investigation also revealed that NO literature, ALPA literature, and carrier literature were prevalent at carrier stations and widely distributed during the election period. There is insufficient evidence of either systematic carrier assistance in the distribution of NO literature or carrier-orchestrated removal of ALPA literature.

VI.

Pre-empting ALPA's Negotiating Role

It is apparent from a review of the record that the scope committee was established in August, 1991 to deal with the complex and confusing questions arising from the carrier's international operations. Despite ALPA's contention that the purpose of the

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[6] Based upon the investigation, the Board finds no basis for granting ALPA's request that the Board compare the two address lists. See, USAir, 18 NMB 290 (1991) note 4 at 333.

scope committee was to negotiate with the carrier, there is insufficient evidence to support such a conclusion. It is also evident that the carrier has historically used committees to deal with or to enhance communications on various work-related problems. However, the Board is disturbed by the timing of the formation of the committee, in the middle of the election period. As the merger with Flying Tiger had occurred two years previously, the Board questions whether it was necessary to establish the committee at that particular point in time.

[49]VII.

Carrier Campaign Communications

A.

The Board has consistently stated that "[t]he privilege of free speech is not absolute. It must be evaluated in the context of the rights of others." USAir, 18 NMB 290 (1991), USAir, 17 NMB 377 (1990), Allegheny, supra. See, also, Texas & New Orleans Railroad v. Brotherhood of Railway and Steamship Clerks, 288 U.S. 548 (1930).

However, the Board has also stated that carriers may communicate to employees concerning election issues. In Laker, supra, the Board noted that it was "not unmindful of Laker's constitutional right to communicate its views to its employees."

The Board has found carrier campaign communications to be in violation of Section 2, Ninth when the communications contain misstatements about Board voting procedures as in Zantop, supra, and Allegheny, supra. In the Board's 1990 USAir decision, the Board found that in addition to making misstatements about Board procedures, USAir made inaccurate statements about subjects of collective bargaining and misleading statements about the organization (IBT). In Mid Pacific Airlines, 13 NMB 178 (1986), the Board found that the carrier had interfered with an election by inter alia, issuing a letter implying that the carrier's financial future rested on

the employees' rejection of union representation. The Board stated in Allegheny, supra:

> It is clear that the employees would read the letter fully appreciative of the power and authority which [the] carrier exercised over them with respect to their day-to-day assignments and security of their jobs. It would be completely unrealistic to believe that under such circumstances employees would not be particularly susceptible to the arguments advanced by the carrier [50]against union representation. It was pure and simple pressure to interfere with a free choice of a representative.

The Board finds the carrier's campaign communications, particularly Smith's July 12 letter, and the carrier's letter regarding dues obligations, of concern. Smith's letter could be perceived as a reminder of the "power and authority" which Smith "exercised." Employees, especially less senior employees, could have been influenced by this and other carrier communications. In addition, whether or not the carrier's letter regarding dues obligations was a deliberate misrepresentation, at the least it was misleading. The Board notes, however, that many of the carrier's letters were issued in response to ALPA's campaign materials. The investigation reveals that employees were sent numerous pieces of campaign literature by ALPA, the carrier and the NO group for a several month period.

VIII.

Furlough Threats

The Board has repeatedly held that threatening employees with adverse actions if they voted for union representation constitutes interference. Key, supra, Laker, supra.

A review of the evidence reveals that there was no concerted effort on the part of the carrier to link furloughs with union representation. Federal Express historically has a no-furlough policy, hence its campaign communications which disputed ALPA's

statements that a union was necessary for job security were not objectionable.

Evidence supports a finding that Sam Davis made remarks about furloughs which spread through Federal Express and caused concern among pilots in March and April. There is insufficient evidence that Davis or any other carrier official continued to make such remarks beyond early spring. In any event, McKinney's letter of April 4, 1991 made it clear that the carrier did not intend to furlough employees. McKinney's [51]placement in the hierarchy was considerably higher than Davis'. However, the laboratory conditions had already been tainted by Davis' remarks, which were disseminated by word of mouth to many pilots.

Individuals who provided testimony on behalf of ALPA stated that they had heard from other junior pilots that they were worried about job security if they voted for ALPA. However, none of the randomly selected employees expressed belief that the carrier would furlough in retaliation for electing ALPA.

CONCLUSION

When Federal Express' conduct is viewed in its totality, the Board finds the laboratory conditions were tainted. The Board finds particular activity objectionable, specifically Davis' remarks in mid-March, which led to the furlough rumors. The Board is also troubled by the carrier's dues misrepresentations and the timing of the formation of the permanent scope committee.

In USAir, 17 NMB 377 (1990), the Board found that the carrier's actions constituted interference when "coupled with a pervasive and sustained anti-union posture...".

While each of the carrier's actions here, standing alone, may not have constituted interference per se, the pervasiveness of the carrier's campaign does concern us. Although the Board allows some involvement by carriers in representation matters, the carrier has a far more limited role in election campaigns than the organiza-

tions. That role is more limited than the overall level of campaign activities taken by the carrier in the instant case.

There is a level of carrier communication, as in this case, which overwhelms an employee's right to select or not select a collective bargaining representative without carrier interference or influence. Indeed, in this case the Board's investigation revealed that many employees began to disregard election material due to its sheer volume.

[52]When a carrier's statements and material override, or render moot, the union's campaign, we find it objectionable and not within the employer's role as anticipated by the Act. In short, in the language of prior decisions on this issue, we find the carrier's actions here have tainted the laboratory conditions necessary for the conduct of a fair election.

The Board finds insufficient evidence in support of ALPA's contentions that the carrier assisted the NO group. Similarly, there is no evidence on the record sufficient to persuade the Board that the carrier concertedly engaged in such illegal activities as surveillance or polling, or made promises of, or conferred benefits in an attempt to influence the election. As to ALPA's contentions about the FAB and the scope committee, there is evidence that the carrier had historically worked with FAB and various committees in order to deal with work-related issues. However, the Board finds the timing of the establishment of the scope committee, during the election period, to be problematic. There is insufficient evidence that the carrier provided the Board with inaccurate addresses in order to manipulate the election results.

In view of all the circumstances in this case, the Board hereby authorizes a re-run election, using its standard ballot. The list of eligible voters will contain all those in the craft or class of Flight Deck Crew Members as of the last day of the last payroll period prior to the date of this decision. The count will take place in Washington, D.C. The election will be conducted on an expedited basis. The carrier must provide the Board with address labels for ballot mailing purposes.

[53]A mediator will be assigned to continue the investigation.

By direction of the NATIONAL MEDIATION BOARD.

/s/
William A. Gill, Jr.
Executive Director

Copies to:

Mr. Frederick Smith
Donald Maliniak, Esq.
Mr. J. Randolph Babbitt
Jonathan Cohen, Esq.
Ms. Laurette Piculin
Ms. Gale L. Oppenberg

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

First Amendment. Congress shall make no law * * * abridging the freedom of speech * * * ; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment. No person shall * * * be deprived of life, liberty, or property, without due process of law * * * .

RAILWAY LABOR ACT

§ 1, 45 U.S.C. § 151. Definitions; short title

When used in this chapter and for the purposes of this chapter—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to subtitle IV of Title 49, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of such "carrier" * * *

* * * * *

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of

Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however*, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

* * * * *

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

* * * * *

§ 1a, 45 U.S.C. § 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5)

to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

§ 2, 45 U.S.C. § 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

* * * * *

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

* * * * *

Eleventh. Union security agreements; check-off

Notwithstanding any other provision of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a

labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

* * * * *

§ 4, 45 U.S.C. § 154. National Mediation Board

First. Board of Mediation abolished; National Mediation Board established; composition; term of office; qualifications; salaries; removal

* * * There is established, as an independent agency in the executive branch of the Government, a board to be known as the "National Mediation Board", to be composed of three members appointed by the President, by and with the advice and consent of the Senate, not more than two of whom shall be of the same political party. Each member of the Mediation Board in office on January 1, 1965, shall be deemed to have been appointed for a term of office which shall expire on July 1 of the year his term would have otherwise expired. The terms of office of all successors shall expire three years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the term for which his

predecessor was appointed shall be appointed only for the unexpired term of his predecessor. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board. Two of the members in office shall constitute a quorum for the transaction of the business of the Board. Each member of the Board shall receive necessary traveling and subsistence expenses, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while away from the principal office of the Board on business required by this chapter. No person in the employment of or who is pecuniarily or otherwise interested in any organization of employees or any carrier shall enter upon the duties of or continue to be a member of the Board. Upon the expiration of his term of office a member shall continue to serve until his successor is appointed and shall have qualified.

* * * * *

A member of the Board may be removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause.

Second. Chairman; principal office; delegation of powers; oaths; seal; report

The Mediation Board shall annually designate a member to act as chairman. The Board shall maintain its principal office in the District of Columbia, but it may meet at any other place whenever it deems it necessary to do so. The Board may designate one or more of its members to exercise the functions of the Board in mediation proceedings. Each member of the Board shall have power to administer oaths and affirmations. The Board shall have a seal which shall be judicially noticed. The Board shall make an annual report to Congress.

Third. Appointment of experts and other employees; salaries of employees; expenditures

The Mediation Board may (1) subject to the provisions of the civil service laws, appoint such experts and assistants to act in a

confidential capacity and such other officers and employees as are essential to the effective transaction of the work of the Board; (2) in accordance with chapter 51 and subchapter III of chapter 53 of Title 5, fix the salaries of such experts, assistants, officers, and employees; and (3) make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding, and including expenditures for salaries and compensation, necessary traveling expenses and expenses actually incurred for subsistence, and other necessary expenses of the Mediation Board, Adjustment Board, Regional Adjustment Boards established under paragraph (w) of section 153 of this title, and boards of arbitration, in accordance with the provisions of this section and sections 153 and 157 of this title, respectively), as may be necessary for the execution of the functions vested in the Board, in the Adjustment Board and in the boards of arbitration, and as may be provided for by the Congress from time to time. All expenditures of the Board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

Fourth. Delegation of powers and duties

The Mediation Board is authorized by its order to assign, or refer, any portion of its work, business, or functions arising under this chapter or any other Act of Congress, or referred to it by Congress or either branch thereof, to an individual member of the Board or to an employee or employees of the Board to be designated by such order for action thereon, and by its order at any time to amend, modify, supplement, or rescind any such assignment or reference. All such orders shall take effect forthwith and remain in effect until otherwise ordered by the Board. In conformity with and subject to the order or orders of the Mediation Board in the premises, such individual member of the Board or employee designated shall have power and authority to act as to any of said work, business, or functions so assigned or referred to him for action by the Board.

* * * * *

§ 5, 45 U.S.C. § 155. Functions of Mediation Board

First. Disputes within jurisdiction of Mediation Board

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

* * * * *

APPENDIX J

COMPLAINT FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, WITH ATTACHED EXHIBIT A TO COMPLAINT

October 15, 1993

IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

FEDERAL EXPRESS PILOTS FOR A)
NON-UNION OPERATION, INC.)
Suite 80)
2095 Exeter Road)
Germantown, TN 38138)
)
JOSE R. BRAVO)
3245 Old Trail Cove)
Memphis, TN 38133)
)
JAMES G. HUTTO)
2177 Hickory Crest)
Memphis, TN 38119)
)
RICHARD D. LICHTERMAN)
1568 Cedar Farms Cove)
Cordiva, TN 38018)
) [COURT STAMP DELETED]
GROVER N. LIPE, JR.)
3524 Neyland Drive)
Collierville, TN 38017)
)
MARK S. LOMBARDO)
8684 Wescott)
Germantown, TN 38138)
)
EDWARD A. LYONS)
2557 Park Creek Cove)
Germantown, TN 38138)
)

STEVEN R. OLIVER 3051 Country Place Drive West Collierville, TN 38017 Plaintiffs, v. NATIONAL MEDIATION BOARD Suite 250, East 1301 K Street, N.W. Washington, D.C. 20005 Defendant.	)	) Civil Action No. 93-2145

COMPLAINT

INTRODUCTION

1. This is a civil action for declaratory, injunctive, extraordinary, and other relief, including inter alia:

(i) an order enjoining and prohibiting Defendant National Mediation Board ("NMB") from continuing to certify, under color of the Railway Labor Act ("RLA") § 2, Ninth,[1] or any other provision of federal law, that non-party Air Line Pilots Association ("ALPA") has been "designated and authorized to represent" the Flight Deck Crew Members of non-party Federal Express Company ("Federal Express"); and

(ii) an order enjoining and prohibiting the NMB from holding any election, except upon conditions specified in the Prayer for Relief herein, among the Flight Deck Crew Members of Federal Express to determine "who are the representatives of such employees

[1] 45 U.S.C. § 152, Ninth.

designated and authorized in accordance with the requirements of" the RLA.[2]

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1337(a), because this action arises under the RLA, 45 U.S.C. §§ 151 et seq., a law of the United States regulating interstate commerce, and under the Constitution of the United States. This Court also has jurisdiction under 28 U.S.C. §§ 1361 and 1651(a), because this action seeks to compel an agency of the United States to perform a duty owed to the Plaintiffs herein. And this Court has jurisdiction to enter declaratory relief under 28 U.S.C. §§ 2201 and 2202.

3. Venue is proper in this Court under 28 U.S.C. § 1391.

PARTIES AND RELEVANT NON-PARTIES

4. Plaintiff Federal Express Pilots for a Non-Union Operation ("FEPNO") is a Tennessee corporation with several hundred supporters among the Flight Deck Crew Members of Federal Express who are "employees" under RLA § 1, Fifth,[3] who are part of a "craft or class of employees" subject to exclusive union representation under RLA § 2, Fourth,[4] but who are not in favor of and at all times relevant to the issues set out in this Complaint have opposed certification of any union, including ALPA, as their representative under the act. Many of the supporters of FEPNO desire to maintain anonymity, because they fear "blacklisting" or other acts of retaliation, intimidation, coercion, or restraint of their basic freedoms by ALPA were their names revealed.

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[2] 45 U.S.C. § 152, Ninth.

[3] 45 U.S.C. § 151, Fifth.

[4] 45 U.S.C. § 152, Fourth.

5. Plaintiff Jose R. Bravo is a Flight Deck Crew Member who works for Federal Express, and is a supporter of FEPNO.

6. Plaintiff James G. Hutto is a Flight Deck Crew Member who works for Federal Express, and is a supporter of FEPNO.

7. Plaintiff Richard D. Lichterman is a Flight Deck Crew Member who works for Federal Express, and is a supporter of FEPNO.

8. Plaintiff Grover N. Lipe, Jr. is a Flight Deck Crew Member who works for Federal Express, and is a supporter of FEPNO.

9. Plaintiff Mark S. Lombardo is a Flight Deck Crew Member who works for Federal Express, and is a supporter of FEPNO.

10. Plaintiff Edward A. Lyons is a Flight Deck Crew Member who works for Federal Express, and is a supporter of FEPNO.

11. Plaintiff Steven R. Oliver is a Flight Deck Crew Member who works for Federal Express, and is a supporter of FEPNO.

12. Defendant NMB is an agency of the United States, created by and acting under color of RLA §§ 2, Ninth, 4, and 5.[5] Under color of RLA § 2, Ninth,[6] the NMB has purported to investigate a dispute among the Flight Deck Crew Members of Federal Express as to who shall be the exclusive representative of the latter, to conduct two secret-ballot elections among the Flight Deck Crew Members, and to certify that as a result of the second election ALPA has been designated and authorized to represent the Flight Deck Crew Members, including the individual Plaintiffs herein and

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[5] 45 U.S.C. §§ 152, Ninth, 154, 155.

[6] 45 U.S.C. § 2, Ninth.

other supporters of FEPNO, under color of RLA § 2, Third and Fourth.[7]

13. Non-party Federal Express is a corporation with main offices at 2005 Corporate Avenue, Memphis, Tennessee 38132, and is a "carrier" under RLA § 1, First.[8] Federal Express is the largest air-cargo carrier in the United States. Federal Express is the employer of the individual Plaintiffs herein and of other supporters of FEPNO.

14. Non-party ALPA is a labor organization or union, with main offices at 1625 Massachusetts Avenue, N.W., Washington, D.C. 20036. ALPA purports to be the "representative", under color of RLA § 1, Sixth,[9] certified for Flight Deck Crew Members of Federal Express, pursuant to an election conducted and certification made by the NMB under color of RLA § 2, Ninth,[10] the validity of which election and certification is an issue in this Complaint.

15. Non-party United States Pilots Association, Inc. ("USPA") is a labor organization or union, with a mailing-address of P.O. Box 503, Cordova, Tennessee 38018-0503. USPA unsuccessfully sought to be elected by "write-in" votes as the representative of Flight Deck Crew Members of Federal Express in the election that resulted in the certification of ALPA challenged in this Complaint.

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[7] 45 U.S.C. § 152, Third and Fourth.

[8] 45 U.S.C. § 151, First.

[9] 45 U.S.C. § 151, Sixth.

[10] 45 U.S.C. § 152, Ninth.

OPERATIVE FACTS

16. On 14 June 1991, the NMB determined that a "dispute" existed, within the meaning of RLA § 2, Ninth,[11] among the Flight Deck Crew Members of Federal Express "as to who are the representatives of such employees designated and authorized in accordance with the requirements of" the act. The NMB then issued a notice that an election among the crew members would be conducted by mail ballot, with the votes to be counted on 22 August 1991 ("the First Election").

17. Under RLA § 2, Fourth, "[t]he majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of [the RLA".[12]

18. In purported implementation of the statutory mandate of RLA § 2, Fourth (but, as alleged below, in violation of the First and Fifth Amendments to the Constitution of the United States), when conducting an election the NMB employs the following election rule:

(a) The NMB first determines whether a majority of eligible voters has cast valid ballots for some union.

(b) If less than a majority casts valid ballots for one or more representative (i.e., if at least 50% of those eligible to vote return void ballots[13] or do not vote at all), the NMB certifies no representative.

(c) If a majority of eligible voters casts valid ballots for some union, the NMB certifies as the representative the union that receives a majority among the valid ballots cast, even though

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[11] 45 U.S.C. § 152, Ninth.

[12] 45 U.S.C. § 152, Fourth.

[13] A "void" ballot is one with "No" or "No union" written on its face.

that union may not have been designated as the representative by a majority of the whole "craft or class" eligible to vote.

Hereinafter, Plaintiffs shall refer to the NMB's election rule as the "majority-of-the-majority" rule.

19. On 21 August 1992, ALPA filed "objections to the election based on carrier interference".

20. On 22 August 1992, the NMB counted the ballots in the First Election, and applied its "majority-of-the-majority" rule. Out of 2,279 pilots, 1,162 (50.99%) did not cast ballots (thereby effectively "voting" against representation); 1,112 (48.79%) voted for representation by ALPA; and 5 (00.22%) cast other valid votes for some representation. The total of 1,117 votes for some representation was 23 votes less than the required majority. Having lost the First Election, ALPA pursued its claims of "carrier interference".

21. In its decision in Air Line Pilots Association, 20 N.M.B. No. 4, at 7 (19 October 1992), the NMB held that Federal Express had tainted the "laboratory conditions" necessary for the election. As a remedy, the NMB ordered a re-run election ("the Second Election") using its standard ballot, with ALPA listed thereon by name and a separate space for write-in votes.

22. The NMB mailed ballots for the Second Election to Flight Deck Crew Members on 3 December 1992, and scheduled its count of votes for 14 January 1993.

23. The NMB ballot used in the Second Election contained the following language:

INSTRUCTIONS FOR VOTING

No Employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified. Should a majority vote to be represented, the

representative which receives a majority of the votes cast will be certified.

If you desire to be represented by: Air Line Pilots Association

Mark an "X" in this square . . . . . [ ]

If you desire to represented by:
ANY OTHER ORGANIZATION OR INDIVIDUAL
Write name of such organization or individual on the line below:

_____ AND

Mark an "X" in this square . . . . . [ ]

24. In the Second Election, USPA ran a "write-in" campaign for votes from the Flight Deck Crew Members. One of USPA's slogans in this campaign was that a Flight Deck Crew Member who voted "NO" (that is, who cast no ballot or a void ballot) was, in effect, voting for ALPA. For example,

- "A 'NO' VOTE...IS A VOTE FOR ALPA!"

- "To vote 'NO' at this time, will ensure that the Air Line Pilots Association is certified as our bargaining agent."

- "2. Is a vote for USPA a vote for ALPA?
  "No. According to NMB rules, if the majority of pilots votes for union representatiuon, then the union that receives the majority of votes cast becomes the representative for the pilots.
  "3. What if I vote 'NO' again?
  Given the closeness of the last election, we feel the option of two unions makes representation inevitable. **To vote NO at this point is in fact a vote for ALPA!** The choice is yours."

25. USPA also communicated to the Flight Deck Crew Members through a pre-recorded telephone "hot-line" on which it represented that a "no vote" was a vote for ALPA, and that crew members should "remember, if you vote no at this time, you're voting for ALPA".

26. In fact, as the results of the Second Election (described post) actually showed, a vote for USPA was, in effect, a vote for ALPA, because of the operation of the NMB's "majority-of-the-majorrity" rule.

27. On 14 January 1993, the NMB counted the ballots in the Second Election. The results of the count were as follows: Of 2,279 eligible voters, 1,015 (44.53%) voted for ALPA; 271 (11.89%) voted for USPA; and 993 (43.57%). Thus, ALPA received a majority of the votes cast for some representation, but less than a majority of the total number of employees in the "craft or class" eligible to vote.

28. An analysis of the two elections shows the closeness of the vote:

	1st election	2nd election	difference
ALPA	1,121	1,015	-97
other	5	0	-5
no union	1,162	993	-169
USPA	0	271	+271

If 147 of the 174 "no union" and "other" votes that shifted to USPA (6.45% of the total of eligible voters) had not done so, the result would have been:

ALPA	1,015 (44.53%)
USPA	124 (5.44%)
no union	1,140 (50.02%)[14].

Under those circumstances, the NMB would have certified no "representative" for the "craft or class".

29. The NMB certified ALPA as the "representative" of the individual Plaintiffs herein and other supporters of FEPNO only because, perforce of the "majority-of-the-majority" rule, the NMB in effect added to the votes actually cast for ALPA the votes cast for USPA. Had the NMB not employed the "majority-of-the-majority" rule, no "representative" would have been certified, as neither ALPA nor USPA individually received a majority of the votes of those members of the "craft or class" eligible to vote.

30. In the First Election, ALPA received 1,112 votes, or 48.79% of the total eligible votes, but was not certified as the "representative" designated by the majority of the "craft or class". In the Second Election, however, ALPA received 1,015 votes, or 44.53% of the eligible votes, but was certified as the "representative" designated by the majority of the "craft or class". Thus, ALPA was certified as the result of the Second Election even though it received fewer votes and a lower percentage of votes than in the First Election.

31. On 14 January 1993, Federal Express filed objections to certification of the election, alleging election-interference on the part of ALPA and USPA. On 19 January 1993, FEPNO also filed objections to certification of the election. Both Federal Express and FEPNO asserted that the election was fundamentally unfair because of USPA's involvement, coupled with the NMB's "majority-of-the-majority" rule. In particular, FEPNO submitted affidavits from Flight Deck Crew Members to the effect that

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[14] One more than one-half of the "craft or class", i.e., 1140 for no union versus 1139 for ALPA and USPA combined.

- they were opposed to representation by ALPA, but felt compelled to vote for USPA in order to have a voice in the selection of a representative;

- they were opposed to representation by any union, but felt compelled to vote for USPA in order to have a voice in selection of a representative; or,

- although they voted for representation by USPA, they would not have not returned a ballot (i.e., would have voted "no union") if ALPA had been the only choice on the ballot.

Federal Express and FEPNO requested that the election be set aside.

32. In its decision in Air Line Pilots Association, 20 N.M.B. No. 86, at 486 (14 June 1993), the NMB rejected FEPNO's and Federal Express' objections, and purported to certify that ALPA had been duly designated and authorized to represent the craft or class of Flight Deck Crew Members. The NMB found that "USPA's slogan did not constitute a misrepresentation of [NMB] voting procedures and policies". However, based on affidavits and "interviews with randomly selected crewmembers", the NMB admitted that

> several crewmembers may have been uncertain whether the best way to defeat ALPA was to vote 'no' (or not to vote), or to support USPA. Individual crewmembers weighed the effect of their vote against the anticipated votes of their fellow crewmembers. Several crewmembers were convinced that some form of representation was inevitable and decided to support USPA as the alternative to ALPA. Others believed that, because in their judgment a majority vote for representation was not inevitable, it was possible to avoid representation altogether by not returning a ballot.[15]

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[15] 20 N.M.B. at 530-531.

33. FEPNO and Federal Express moved for reconsideration. But the Board denied their motions on 13 August 1993.[16]

34. The NMB purports to have certified ALPA as the RLA "representative" of the Flight Deck Crew Members, including the individual Plaintiffs herein and other supporters of FEPNO, solely on the basis of ALPA's election by an actual minority of the "craft or class" eligible to vote.

35. The NMB's certification of ALPA as the "representative" of the individual Plaintiffs herein and other supporters of FEPNO forces those Flight Deck Crew Members into an associational relationship with ALPA, in which relationship ALPA claims the right, power, and privilege to control the terms and conditions of those individuals' employment at Federal Express through inter alia negotiation of collective-bargaining agreements, administration of such agreements, and the adjustment of grievances arising under such agreements.

36. Under color of the NMB's certification, ALPA claims and will claim to be the RLA "representative" of the Flight Deck Crew Members, including the individual Plaintiffs herein and other supporters of FEPNO, solely on the basis of ALPA's election by an actual minority of the "craft or class" eligible to vote.

37. Under color of the RLA, and solely on the basis of the NMB's certification of ALPA's election by an actual minority of the "craft or class" eligible to vote, Federal Express is and will be required to confer with ALPA as the purported "representative" of the Flight Deck Crew Members, including the individual Plaintiffs herein and other supporters of FEPNO.

38. Under color of the RLA, and solely on the basis of the NMB's certification of ALPA's election by an actual minority of the "craft or class" eligible to vote, the individual Plaintiffs herein and other supporters of FEPNO are and will be required, as a condition

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[16] 20 N.M.B. No. 106, at 659.

of their employment by Federal Express, to accept ALPA as their purported "representative". As such "representative", ALPA will have and exercise effective control over the terms and conditions of employment under which the individual Plaintiffs herein and other supporters of FEPNO work. As their "representative", ALPA may also agree with Federal Express to require, as a condition of their employment, that the individual Plaintiffs herein and other supporters of FEPNO "become members of" ALPA within the meaning of RLA § 2, Eleventh.[17]

39. RLA § 1a[18] states that two of the purposes of the act are "to forbid any limitation upon freedom of association among employees" and "to provide for the complete independence * * * of employees in the matter of self-organization". RLA § 2, Fourth[19] provides that "[t]he majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of" the act. And RLA § 2, Ninth[20] provides that the NMB "shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duty designated and authorized representatives in such manner as shall insure the choice of representatives by the employees".

40. Plaintiffs hereby fully incorporate by reference as allegations in this Complaint the AFFIDAVIT OF WILLIAM MARK CRAIN, IN SUPPORT OF PLAINTIFFS, which is essential to the determination of this action, and therefore attached hereto as EXHIBIT A.

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[17] 45 U.S.C. § 152, Eleventh.

[18] 45 U.S.C. § 151a.

[19] 45 U.S.C. § 152, Fourth.

[20] 45 U.S.C. § 152, Ninth.

FIRST CLAIM FOR RELIEF

41. Plaintiffs re-allege and reassert the allegations set out in paragraphs 1 through 40 of this Complaint.

42. The requirement of RLA § 2, Fourth[21] that the individual Plaintiffs herein and other supporters of FEPNO accept a collective "representative" as a condition of their employment by Federal Express when "[t]he majority of any craft or class of employees * * * determine[s] who shall be the representative" infringes on said Plaintiffs' and other individuals'

(a) freedom not to associate with a union or labor organization and freedom of speech, protected by the First Amendment to the Constitution of the United States, and

(b) freedom of contract, protected by the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

43. If the aforesaid rights under the First and Fifth Amendments of the individual Plaintiffs herein and other supporters of FEPNO may be overridden by an election in which an actual majority of the "craft or class" selects a "representative", nevertheless the NMB's use of the "majority-of-the-majority" rule (including all regulations, policies, and other administrative practices of the NMB purporting to sanction and implement that rule) in the Second Election — whereby an actual "majority of any craft or class of employees" did not have "the right to determine who shall be the representative of the craft or class for the purposes of" the RLA, but had only the right to determine that there shall be some union repre-sentative, the specific identity of that representative being determined only by a "majority of the majority", which resulted in ALPA's being selected by an actual minority of "the craft or class" —

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[21] 45 U.S.C. § 152, Fourth.

(a) did not achieve, subserve, or advance any compelling, overriding, substantial, or legitimate governmental interest superior to the constitutional rights of the individual Plaintiffs herein and other supporters of FEPNO, who do not support ALPA as their RLA "representative";

(b) did not achieve, subserve, or advance any compelling, overriding, substantial, or legitimate governmental interest by a means least-restrictive of the rights of the individual Plaintiffs herein and other supporters of FEPNO described in this Complaint;

(c) was not rationally related to the achievement of any compelling, overriding, substantial, or legitimate governmental interest;

(d) in fact and law defeated, frustrated, and prevented the achievement of any compelling, overriding, substantial, or legitimate governmental interest sought to be attained by the RLA; and therefore

(d) violated the rights of the individual Plaintiffs herein and other supporters of FEPNO.

44. If the NMB's use of its "majority-of-the-majority" rule in the Second Election did not violate the RLA (as alleged in the SECOND CLAIM FOR RELIEF herein), then that use (together with all regulations, policies, and other administrative practices of the NMB purporting to sanction and implement that use), those sections of the RLA which sanction that use, or both are pro tanto repugnant to the First and Fifth Amendments to the Constitution of the United States.

45. If the aforesaid rights under the First and Fifth Amendments of the individual Plaintiffs herein and other supporters of FEPNO may be overridden by an election in which an actual majority of the "craft or class" selects a "representative" using a non-biased ballot, nevertheless the NMB's use of its standard ballot in the Second Election (together with all regulations, policies, and

other administrative practices of the NMB purporting to sanction and implement such use)

(a) did not achieve, subserve, or advance any compelling, overriding, substantial, or legitimate governmental interest superior to the constitutional rights of the individual Plaintiffs herein and other supporters of FEPNO, who do not support ALPA as their RLA "representative";

(b) did not achieve, subserve, or advance any compelling, overriding, substantial, or legitimate governmental interest by a means least-restrictive of the rights of the individual Plaintiffs herein and other supporters of FEPNO described in this Complaint;

(c) was not rationally related to the achievement of any compelling, overriding, substantial, or legitimate governmental interest;

(d) in fact and law defeated, frustrated, and prevented the achievement of any compelling, overriding, substantial, or legitimate governmental interest sought to be attained by the RLA; and therefore

(d) violated the rights of the individual Plaintiffs herein and other supporters of FEPNO.

46. If the NMB's use of its standard ballot in the Second Election did not violate the RLA (as alleged in the SECOND CLAIM FOR RELIEF herein), then the use of that ballot (together with all regulations, policies, and other administrative practices of the NMB purporting to sanction and implement such use), those sections of the RLA which sanction that use, or both are pro tanto repugnant to the First and Fifth Amendments to the Constitution of the United States.

47. If the NMB's use of its "majority-of-the-majority" rule or the NMB's use of its standard ballot in the Second Election did not separately violate the rights of the individual Plaintiffs herein and

other supporters of FEPNO, the combined use of that rule and that ballot in the Second Election (together with all regulations, policies, and other administrative practices of the NMB purporting to sanction and implement such rule and such use)

(a) did not achieve, subserve, or advance any compelling, overriding, substantial, or legitimate governmental interest superior to the constitutional rights of the individual Plaintiffs herein and other supporters of FEPNO, who do not support ALPA as their RLA "representative";

(b) did not achieve, subserve, or advance any compelling, overriding, substantial, or legitimate governmental interest by a means least-restrictive of the rights of the individual Plaintiffs herein and other supporters of FEPNO described in this Complaint;

(c) was not rationally related to the achievement of any compelling, overriding, substantial, or legitimate governmental interest;

(d) in fact and law defeated, frustrated, and prevented the achievement of any compelling, overriding, substantial, or legitimate governmental interest sought to be attained by the RLA; and therefore

(d) violated the rights of the individual Plaintiffs herein and other supporters of FEPNO.

48. If the NMB's combined use of its "majority-of-the-majority" rule and its standard ballot in the Second Election did not violate the RLA (as alleged in the SECOND CLAIM FOR RELIEF herein), then the use of that rule and that ballot (together with all regulations, policies, and other administrative practices of the NMB purporting to sanction and implement such rule and such use), those sections of the RLA which sanction that rule and use, or both are pro tanto repugnant to the First and Fifth Amendments to the Constitution of the United States.

49. The individual Plaintiffs herein and other supporters of FEPNO are suffering and will suffer irreparable injury from abridgment of their fundamental First- and Fifth-Amendment freedoms as a result of the Second Election and, under color of that election, of

(a) the NMB's purported certification of ALPA as the RLA "representative" of Flight Deck Crew Members;

(b) ALPA's claim (and actions taken and to be taken under color of its claim) to be the RLA "representative" of Flight Deck Crew Members;

(c) the requirement of the RLA that Federal Express confer and bargain exclusively with ALPA as the "representative" of Flight Deck Crew Members; and

(d) the requirement of the RLA that Federal Express not confer and bargain with the individual Plaintiffs and other supporters of FEPNO concerning their own terms and conditions of employment.

SECOND CLAIM FOR RELIEF

50. Plaintiffs re-allege and reassert the allegations set out in paragraphs 1 through 49 of this Complaint.

51. The NMB's use of its "majority-of-the-majority" rule (including all regulations, policies, and other administrative practices of the NMB purporting to implement that rule) in the Second Election — whereby an actual "majority of any craft or class of employees" did not have "the right to determine who shall be the representative of the craft or class for the purposes of" the RLA, but had only the right to determine that there shall be some union representative, the specific identity of that representative being determined only by a "majority of the majority", which resulted in ALPA's being selected by a minority of "the craft or class" —

(a) contravened RLA §§ 1a, 2, Fourth, and 2, Ninth;[22]

(b) did not serve or advance, and was inconsistent with and antagonistic to, the purposes of the RLA, and was a gross violation of statutory policy;

(c) failed to fulfill the NMB's statutory duty to "investigate" a representational dispute so as to allow full and free expression of employee desires with regard to collective representation;

(d) failed to fulfill the NMB's statutory duty to find "who shall be the representative" of "the majority of the craft or class"; and

(e) was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the requirements of the RLA.

50. The NMB's use of its standard ballot in the Second Election

(a) contravened RLA §§ 1a, 2, Fourth, and 2, Ninth;[23]

(b) did not serve or advance, and was inconsistent with and antagonistic to, the purposes of the RLA, and was a gross violation of statutory policy;

(c) failed to fulfill the NMB's statutory duty to "investigate" a representational dispute so as to allow full and free expression of employee desires with regard to collective representation;

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[22] 45 U.S.C. §§ 151a, 152, Fourth, and 152, Ninth.

[23] 45 U.S.C. §§ 151a, 152, Fourth, and 152, Ninth.

(d) failed to fulfill the NMB's statutory duty to find "who shall be the representative" of "the majority of the craft or class"; and

(e) was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the requirements of the RLA.

51. The NMB's combined use of its "majority-of-the-majority" rule and its standard ballot in the Second Election

(a) contravened RLA §§ 1a, 2, Fourth, and 2, Ninth;[24]

(b) did not serve or advance, and was inconsistent with and antagonistic to, the purposes of the RLA, and was a gross violation of statutory policy;

(c) failed to fulfill the NMB's statutory duty to "investigate" a representational dispute so as to allow full and free expression of employee desires with regard to collective representation;

(d) failed to fulfill the NMB's statutory duty to find "who shall be the representative" of "the majority of the craft or class"; and

(e) was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the requirements of the RLA.

52. The individual Plaintiffs herein and other supporters of FEPNO are suffering and will suffer irreparable injury from abridgment of their statutory rights under the RLA as a result of the Second Election and, under color of that election, of

(a) the NMB's purported certification of ALPA as the RLA "representative" of Flight Deck Crew Members;

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[24] 45 U.S.C. §§ 151a, 152, Fourth, and 152, Ninth.

(b) ALPA's claim (and actions taken and to be taken under color of its claim) to be the RLA "representative" of Flight Deck Crew Members;

(c) the requirement of the RLA that Federal Express confer with ALPA as the "representative" of Flight Deck Crew Members; and

(d) the requirement of the RLA that Federal Express not confer with the individual Plaintiffs and other supporters of FEPNO concerning their own terms and conditions of employment.

53. In asserting this SECOND CLAIM FOR RELIEF, Plaintiffs acknowledge that the the NMB's "majority-of-the-majority" rule challenged in this Complaint has been upheld or has received favorable judicial comment in several cases.[25] However,

(a) the status of the individual Plaintiffs herein and other supporters of FEPNO as employees and the fundamental constitutional rights they assert in their FIRST CLAIM FOR RELIEF, ante; and

(b) the scientific analysis and experimental evidence set out in the AFFIDAVIT OF WILLIAM MARK CRAIN, IN SUPPORT OF PLAINTIFFS[26] and here presented for the first time in any litigation known to Plaintiffs

distinguish this case from the cases cited in footnote 25, and provide the bases for Plaintiffs' good-faith argument for the extension, modification, or reversal of existing law as it may have been applied in one or more of the aforesaid cases.

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[25] E.g., Aeronautical Radio, Inc. v. NMB, 380 F.2d 624 (D.C. Cir. 1967); Zantop International Airlines, Inc. v. NMB, 732 F.2d 517 (6th Cir. 1984).

[26] See Paragraph 40, ante.

NECESSITY FOR EQUITABLE AND EXTRAORDINARY RELIEF

54. Plaintiffs have exhausted all administrative remedies available to them.

55. Plaintiffs have no adequate remedy at law.

56. The individual Plaintiffs herein and other supporters of FEPNO are suffering and, absent equitable or extraordinary relief from this Court, will suffer irreparable injury from abridgment of their federal statutory and constitutional rights, as described ante.

57. Absent equitable or extraordinary relief from this Court, the individual Plaintiffs herein and other supporters of FEPNO will have no remedy at all for the violations of their federal statutory and constitutional rights alleged in this Complaint.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court grant them the following relief:

A. Enter a declaratory judgment that the NMB's purported certification of 14 June 1993 of ALPA as the RLA "representative" of the "craft or class" of Flight Deck Crew Members employed by Federal Express is null, void, and of no operation or effect.

B. Enter a preliminary and permanent injunction or other appropriate extraordinary order or writ of relief, requiring the NMB to set aside or otherwise treat as null, void, and of no operation or effect its purported "certification" of 14 June 1993 of ALPA as the RLA "representative" of the "craft or class" of Flight Deck Crew Members employed by Federal Express.

C. Enter a preliminary and permanent mandatory injunction or other appropriate extraordinary order or writ of relief, restraining and prohibiting the NMB from holding any further election among the "craft or class" of Flight Deck Crew Members employed by

Federal Express to determine an RLA "representative" of crew members, unless and until the NMB adopts an election-rule under the operation of which no union may be certified as the "representative" unless that union receives a majority of the votes of all members of the "craft or class" eligible to vote.

D. Grant Plaintiffs their costs of this action, and reasonable attorneys' fees. And,

E. Grant such other and further relief as the Court may deem equitable and proper.

/s/
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EXHIBIT A TO COMPLAINT

IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

FEDERAL EXPRESS PILOTS FOR A NON-UNION OPERATION, INC. et alia,	)	
Plaintiffs,	)	
v.	)	Civil Action No. ___
NATIONAL MEDIATION BOARD,	)	
Defendant.	)	

AFFIDAVIT OF WILLIAM MARK CRAIN,
IN SUPPORT OF PLAINTIFFS

COMMONWEALTH OF VIRGINIA:

COUNTY OF FAIRFAX: TO WIT,

I, WILLIAM MARK CRAIN, being duly sworn, hereby depose and state as follows:

1. I am over twenty-one (21) years old; am a citizen of the United States and of the Commonwealth of Virginia, with my office at the George Mason University Center for Study of Public Choice, George's Hall, Fairfax, Virginia 22030; am not a party or related to any party in the above-captioned civil action; am competent to testify under the laws of the United States, the Commonwealth of

Virginia, and the District of Columbia; and have personal knowledge of the facts and matters set out in this affidavit.

2. Attached hereto as EXHIBIT B is my personal curriculum vitae, which I incorporate in full by reference in this paragraph of this Affidavit, as evidence that I am qualified as a expert by virtue of knowledge, skill, experience, training, and education to give an opinion on the matters covered in this Affidavit. I have published more than 70 books and articles, over half of which deal with topics related to Public Choice, electoral processes, and voting behavior. My most recent book, Predicting Politics: Essays in Empirical Public Choice (University of Michigan Press) is widely cited by political scientists and economists, and provides a representative example of my work on issues relevant to this case.

3. Counsel for the Plaintiffs in the above-captioned civil action asked me to prepare this Affidavit.

I. STATEMENT OF AND ANSWER TO THE QUESTION PRESENTED

4. Counsel for the Plaintiffs asked me to answer the following question:

> Was the election held among the Flight Deck Crew Members of Federal Express, in which the National Mediation Board employed its so-called "majority-of-the-majority" rule and its standard ballot, a scientifically satisfactory way to determine whether the majority of the Flight Deck Crew Members of Federal Express Corporation desired "representation" by the Air Line Pilots Association?

5. In my professional opinion, to a reasonable degree of certainty, the answer to this question is "No", for the following reasons:

(a) As a matter both of Public Choice (i.e., voting) theory and experimental evidence, the National Mediation Board's ("NMB's")

"majority-of-the-majority" rule[1] is a deficient and capricious method for selecting union representation or nonrepresentation, in comparison to a simple alternative procedure such as a "run-off" election-rule. And,

(b) As a matter of experimental evidence, the NMB's standard ballot is biased in favor of union certification.

I describe in detail below the bases for these conclusions.

II. THE FACTUAL CONTEXT

6. In answering the aforesaid question, I have assumed the following hypothetical facts, for the purpose of setting the context for my analysis of the NMB's "majority-of-the-majority rule" and its standard ballot:

(a) Section 1a of the Railway Labor Act ("RLA")[2] states that two of the purposes of the act are "to forbid any limitation upon freedom of association among employees" and "to provide for the complete independence * * * of employees in the matter of self-organization". Section § 2, Fourth of the RLA[3] provides that "[t]he majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of" the act. And Section 2, Ninth of the RLA[4] provides that the NMB "shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duty designated and authorized representatives in such manner as shall insure the choice of representatives by the employees".

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[1] Described in ¶ 6(f), post.

[2] 45 U.S.C. § 151a.

[3] 45 U.S.C. § 152, Fourth.

[4] 45 U.S.C. § 152, Ninth.

(b) The Air Line Pilots Association ("ALPA") is a labor organization or union.[5]

(c) The United States Pilots Association ("USPA") is a labor organization or union.

(d) Federal Express is an air-cargo carrier.

(e) On 14 June 1991, the NMB determined that a "dispute" existed, within the meaning of Section 2, Ninth of the RLA,[6] among the Flight Deck Crew Members of Federal Express "as to who are the representatives of such employees designated and authorized in accordance with the requirements of" the RLA. The NMB then issued a notice that an election among the crew members would be conduct-ed by mail ballot.

(f) When conducting an election under Section 2, Fourth of the RLA, the NMB employs the following election rule:

(1) The NMB first determines whether a majority of eligible voters favors some representation, by having cast valid ballots for some union.

(2) If less than a majority votes for one or more representatives (i.e., 50% or more of the employees eligible to vote either return "void" ballots[7] or return no ballots at all), the NMB certifies no representative.

(3) If a majority of eligible voters favors some representation by voting for some union, the NMB certifies as the

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[5] My analysis and conclusions do not depend in any way on the identity of the parties involved in the election. But I am aware that this election involved a union-representation situation.

[6] 45 U.S.C. § 152, Ninth.

[7] A "void" ballot is one with "No" or "No union" written on its face, or otherwise improperly marked or defaced.

representative the particular union that received a majority among the valid ballots cast, even though that union may not have been designated as the representative by a majority of the whole "craft or class" eligible to vote.

I shall refer to the NMB's election rule as the "majority-of-the-majority" rule.

(g) On 22 August 1992, the NMB counted the ballots in the election, and applied its "majority-of-the-majority" rule. Out of 2,279 pilots, 1,162 (50.99%) did not cast ballots (thereby effectively "voting" against representation); 1,112 (48.79%) voted for representation by ALPA; and 5 (0.22%) cast other valid votes for some representation. The total of 1,117 votes for some representation was 23 votes less than the required majority.

(h) As the result of a claim by ALPA that there had been "carrier interference" in the election, the NMB ordered a second election. In this second election, the NMB used its standard ballot, with ALPA listed thereon by name and a separate space for write-in votes.

(i) The NMB ballot used in the second election contained the following language:

INSTRUCTIONS FOR VOTING

No Employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified. Should a majority vote to be represented, the representative which receives a majority of the votes cast will be certified.

If you desire to be represented by: Air Line Pilots Association

Mark an "X" in this square . . . . . [ ]

If you desire to represented by:
ANY OTHER ORGANIZATION OR INDIVIDUAL

Write name of such organization or individual on the line below:

_____AND

Mark an "X" in this square . . . . . [ ][8]

(j) In the second election, USPA ran a "write-in" campaign for votes from the Flight Deck Crew Members. One of USPA's slogans in this campaign was that a Flight Deck Crew Member who voted "NO" (that is, who cast no ballot or a "void" ballot) was, in effect, voting for ALPA. For example —

- "A 'NO' VOTE...IS A VOTE FOR ALPA!"

- "To vote 'NO' at this time, will ensure that the Air Line Pilots Association is certified as our bargaining agent."

- "2. Is a vote for USPA a vote for ALPA?
  "No. According to NMB rules, if the majority of pilots votes for union representatiuon, then the union that receives the majority of votes cast becomes the representative for the pilots.
  "3. What if I vote 'NO' again?
  Given the closeness of the last election, we feel the option of two unions makes representation inevitable. **To vote NO at this point is in fact a vote for ALPA!** The choice is yours."[9]

In fact, as the election-results (described below) actually showed, a vote for USPA was, in effect, a vote for ALPA, because of the operation of the NMB's "majority-of-the majority" rule.

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[8] EXHIBIT C attached hereto.

[9] EXHIBIT D attached hereto.

(k) In response to an objection by Plaintiff FEPNO to the second election, the NMB found that "USPA's slogan did not constitute a misrepresentation of [NMB] voting procedures and policies". However, based on affidavits and "interviews with randomly selected crewmembers", the NMB admitted that

> several crewmembers may have been uncertain whether the best way to defeat ALPA was to vote 'no' (or not to vote), or to support USPA. Individual crewmembers weighed the effect of their vote against the anticipated votes of their fellow crewmembers. Several crewmembers were convinced that some form of representation was inevitable and decided to support USPA as the alternative to ALPA. Others believed that, because in their judgment a majority vote for representation was not inevitable, it was possible to avoid representation altogether by not returning a ballot.[10]

The NMB did not determine how many of the voters who voted in the first election for "no union" or "other" voted in the second election for USPA in order "to defeat ALPA", or how many of those who voted for USPA in the second election would have voted for "no union" if a third, run-off election had been held between ALPA and "no union".

(l) On 14 January 1993, the NMB determined the result of the second election: Of 2,279 eligible voters, 1,015 (44.53%) voted for ALPA; 271 (11.89%) voted for USPA; and 993 (43.57%) did not cast ballots (thereby effectively "voting" against representation). Thus, ALPA received a majority of the votes cast for some representation, but less than a majority of the total number of employees in the "craft or class" eligible to vote.

(m) Analysis of the two elections shows the closeness of the vote:

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[10] Air Line Pilots Association, 20 N.M.B. No. 86, at 486 (14 June 1993), pages 530-531.

	1st election	2nd election	difference
ALPA	1,112	1,015	-97
other	5	0	-5
no union	1,162	993	-169
USPA	0	271	+271

If 147 of the 174 "no-union" and "other" votes that shifted to USPA (6.45% of the total of eligible voters) had not done so, the result would have been:

ALPA	1,015 (44.53%)
USPA	124 [271-147] (5.44%)
no union	1,140 [993+147] (50.02%).[11]

Under those circumstances, the NMB would have certified no "representative" for the "craft or class".

(n) Overall, then, through the operation of the NMB's "majority-of-the-majority" rule in this case, an actual "majority of [the] craft or class of employees" of Flight Deck Crew Members did not have "the right to determine who shall be the representative of the craft or class for the purposes of" the RLA, but had only the right to determine that there shall be some union representa-tive, the specific identity of that representative be-ing determined only by a "majority of the majority", which resulted in ALPA's be-ing selected by an actual minority of the "craft or class".

7. In answering the aforesaid question (paragraphs 4-5, above), I have also assumed the following hypothetical principles of law:[12]

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[11] One more than one-half of the "craft or class", i.e., 1140 for no union versus 1139 for ALPA and USPA combined.

[12] I merely assume that these principles, which have been supplied to me by Plaintiffs' Counsel, are correct statements of the law. My own Public Choice analysis does not depend on these principles in any way.

(a) The requirement of Section 2, Fourth of the RLA[13] that the Flight Deck Crew Members accept a collective "representative" as a condition of their employment by Federal Express when "[t]he majority of any craft or class of employees * * * determine[s] who shall be the representative" infringes on the freedom of those Crew Members not to associate with a union or labor organization, which is protected by the First Amendment to the Constitution of the United States.

(b) In order for such an infringement on a First-Amendment right to be allowed, the NMB's "majority-of-the-majority" rule must serve a "compelling" governmental interest, and be the "least-restrictive means" to serve that interest. The "compelling" governmental interest in this case is the selection of a "representative" by a majority of the "craft or class" (that is, by a majority of all those eligible to vote). And the "least-restrictive means" to select the "representative" desired by the majority is the means that in fact results in such selection, that is superior to other available means for such selection, and that is a practical alternative to such other means.

III. APPLICATION OF THE THEORY OF PUBLIC CHOICE

8. It is my professional opinion, to a reasonable degree of certainty, that the "Theory of Public Choice" is the proper academic discipline to analyze the problems raised by the NMB's "majority-of-the-majority" rule and the bias in the NMB's standard ballot. Work in the 1950s and early 1960s by Paul Samuelson (1954),[14] Anthony Downs (1957),[15] Duncan Black (1958),[16] James Bu-

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[13] 45 U.S.C. § 152, Fourth.

[14] P. Samuelson, "The Pure Theory of Public Expenditure", Review of Economics and Statistics (1954).

[15] A. Downs, An Economic Theory of Democracy (1957).

[16] D. Black, The Theory of Committees and Elections (1958).

chanan and Gordon Tullock (1962),[17] and Kenneth Arrow (1962)[18] formed the basis of Public Choice. Public Choice applies the analytical tools and methods of economics to the subject matter of political science. After 35 years and four Nobel Prizes awarded in part for advances in this field,[19] Public Choice has amassed an international follow-ing and become a major force in contemporary social science.

9. A principal focus of Public Choice since its formative stages has been the effects of alternative voting-rules on the outcomes of collective decision-making (that is, elections). The academic literature is replete with formal models and empirical applications which deal with or investigate the potential for various voting-rules to generate results that are unrepresentative of the true preferences of the voters. The understanding that seemingly reasonable and fair voting-practices that are widely practiced are nevertheless capable of producing perverse results is now firmly established in mainstream political analysis. That important differences arise when alternative voting-rules and democratic procedures are used illustrates the single most important lesson that Public Choice teaches: namely, that institutions do matter.

10. Awareness of the potential shortcomings of collective decision-making processes is not a blanket indictment of collective action. Political processes need not be evaluated against unattainable standards. However, comparative analysis and evaluation of feasible alternatives does offer a firm foundation upon which positive election reforms can be constructed.

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[17] J.M. Buchanan & G. Tullock, The Calculus of Consent (1962).

[18] K. Arrow, Social Choice and Individual Values (rev. ed. 1963).

[19] One of the Nobel Prizes was awarded to James Buchanan, of the George Mason University Center for Study of Public Choice.

A. Theoretical analysis of the NMB's "majority-of-the-majority" rule.

11. It is my professional opinion, to a reasonable degree of certainty, that in a significant number of situations the apparent "winner" of an election using the NMB's "majority-of-the-majority" rule is not the outcome that is actually preferred by the majority of employees eligible to vote in the "craft or class".[20]

12. It is also my professional opinion, to a reasonable degree of certainty, that alternative voting-rules significantly outperform the NMB's "majority-of-the-majority" rule. Alternative rules would by identify more efficiently "winners" that reflect the true preferences of the majority of employeess eligible to vote in the "craft or class" than do the "winners" identified by the NMB's rule. If the goal of a "representation" election under the RLA is to identify the true preference of the majority of employees eligible to vote in the "craft or class", and if a failure to identify this true preference is an infringement on the employees' rights, then there are feasible voting-rules that are less-restrictive of the employees' rights than is the NMB's "majority-of-the-majority" rule. That is, there are feasible voting-rules that are significantly more likely than the NMB's rule to identify the majority's true preference.

13. Analysis of the NMB's "majority-of-the-majority" rule involves four elements:

(a) a model and criteria used to evaluate the representativeness of the outcomes of various voting-procedures;

(b) examples that illustrate the nature and types of problems that arise;

(c) comparisons between the NMB's "majority-of-the-majority" rule and alternative voting-rules that demonstrate that the

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[20] The "winner", of course, may be a particular union or a majority vote for no union.

chances of unrepresentative outcomes can be substantially reduced; and

(d) a generalization of particular examples to define more broadly the conditions under which problems occur, and the likelihood that such problems will occur.

14. The logical principle at work in this analysis is known as the "transitivity property". The transitivity property is important because it determines whether an election produces outcomes that are consistent with the majority's preferences. For example, consider an election in which there are three options: A, B, and C. Suppose Option A receives more votes than Option B; and Option B receives more votes than Option C. That is, Option A wins the three-way race; Option B comes in second; and Option C comes in third. Transitivity requires that the majority would also prefer Option A to Option C, or simply that the preferences of the majority are accurately reflected in the election-returns of the three-way race. The test criterion for transitivity is that a majority would vote for Option A over Option C in a two-way race. If the transitivity property is satisfied (i.e., Option A defeats Option C), then the three-way election produced an outcome that is consistent with the majority's preferences. However, the transitivity property is violated (the outcome is "intransitive") if a majority would vote for Option C over Option A, or Option B over Option A, in a two-way race. In that event, the three-way election that produced Option A as the winner does not reflect the true preference of the majority.

15. In the analysis described below, the transitivity property is developed by means of a simplifying model. However, the transitivity property is quite general. The examples are merely expository devices that avoid a more formal mathematical development which is unnecessarily cumbersome for the task at hand.

1. Model and evaluation criterion

16. The preference orderings for five voters over three proposals are shown in Table 1. "Preferences" reflect each voter's personal evaluation of how the proposals will affect his or her well-

being: namely, "Will I be better off under ALPA, USPA, or No Union?" Because a voter need know only his or her own preferences, the informational requirements of the model are minimal and plausible. "Preference orderings" are the abilities of the voters to rank the proposed options. For example, in Table 1 Voter V likes the ALPA option best, the USPA option second-best, and the No Union option least. Voter X likes the No Union option best, the USPA option second-best, and the ALPA option least.

17. The evaluation criterion centers on whether the winning option under the NMB's "majority-of-the-majority" rule reflects the actual preferences of the majority of the voters. If it does not, the issue is whether a feasible alternative rule would produce a winner that matches the majority's preferences.

2. Examples

18. It is my professional opinion, to a reasonable degree of certainty, that, when the NMB's "majority-of-the-majority" rule is used, the winning proposal can be contrary to the preferences of the majority in a number of situations that the following analysis will explore. Using the NMB's rule, several examples of second-best and third-best outcomes can result, depending on the voters' preferences. I examine three examples in turn, using simplified scenarios involving only a few voters. By extension, the principles these examples illustrate are applicable to elections involving any number of voters.

19. Example 1. The first example illustrates an election in which the "wrong" union wins, where "wrong" is defined as a winner that is not preferred by a majority. The preference orderings displayed in Table 1 produce such a perverse outcome. The numbers in this example are not necessarily intended to fit the facts in the Federal Express election. Instead, the purpose is to demonstrate that a variety of perverse outcomes can arise, depending on the voter preferences. Assuming that each voter in this first example votes for his or her most preferred option, under the NMB's "majority-of-the-majority" rule ALPA receives two votes (Voter V and Voter W), USPA receives one vote (Voter Z), and No

Union receives two votes (Voter X and Voter Y). This vote count is shown in Table 1 under column (1) labelled NMB Election. A simple majority — three voters out of five — supported either ALPA or USPA; and, under the NMB's rule, a union will be certified. Because ALPA received a majority of the pro-union votes (two out of three votes), it will be the union certified. ALPA is the "win-ner", because of the NMB's "majority-of-the-majority" rule, not because of the majority's desire to elect ALPA.

20. The outcome in Example 1, the certification of ALPA, does not reflect the preferences of the majority. If an election were held between ALPA and USPA, three of the five voters would support USPA, as shown in column (3) of Table 1 (Voters X, Y, and Z prefer USPA to ALPA; whereas, Voters V and W prefer ALPA to USPA). In sum, a simple change of the rules to require a run-off election would result in an outcome more representative of the majority's desire than use of the NMB's "majority-of-the-majority" rule.

21. Example 2. The second example, illustrated in Table 2, depicts a related situation. Again, in this second example, the preference orderings do not necessarily correspond to the actual returns in the Federal Express election. Here, USPA is certified as the winner under the NMB's "majority-of-the-majority" rule, although a majority of the eligible voters prefers ALPA to USPA. Three out of the five voters prefer one or the other union as their first choice. USPA receives two votes and ALPA one; and USPA is the certified winner. However, this outcome does not represent the majority's preference. For column (3) shows that in a direct, run-off election between ALPA and USPA, ALPA defeats USPA by a margin of three to two.

22. Preference intransitivity is the reason for the perverse results using the NMB's "majority-of-the-majority" rule, as shown in Example 1 and Example 2. In Table 1, the two voters who preferred No Union as their first option (Voters X and Y) preferred ALPA least of all. In a run-off election, Voters X and Y could exercise their preferences for their second option, USPA, and avert their worst option, ALPA. In Table 2, USPA wins under the

"majority-of-the-majority" rule, which is the worst-case outcome for Voters X and Y. They prefer ALPA to USPA; and this preference-ordering reverses the outcome under a run-off election between ALPA and USPA.

23. Example 3. This example, shown in Table 3, demonstrates the possibility of a result even more perverse than certifying the wrong union. Here, not only does the wrong union (ALPA) win under the NMB's "majority-of-the-majority" rule, but also the No Union option is actually preferred by the majority. As in the previous examples, under the NMB rule the combined "union vote" is three out of five, with ALPA receiving two votes and USPA one vote. ALPA is thus the winner the NMB certifies. However, in a direct election between ALPA and USPA, as shown in column (3), USPA would be preferred by three out of the five voters.

24. More importantly, consider the results of run-off elections between ALPA and No Union, and between USPA and No Union. As shown in column (2) of Table 3, in a run-off between ALPA and No Union, Voters X, Y, and Z — a majority of the voters — prefer No Union to ALPA. As shown in column (4) of Table 3, in a run-off election between USPA and No Union, Voters W, X, and Y — again, a majority of the eligible voters — prefer No Union to USPA. Thus, use of the NMB's "majority-of-the-majority" rule not only certifies the wrong union (ALPA), but frustrates the preference of the majority to have no union at all.

25. Example 3 should be compared with the actual election at Federal Express, in which ALPA was certified as the "winner" under the NMB's "majority-of-the-majority" rule, apparently as the result of the switch of 147 votes from No Union or "other" to USPA, under circumstances in which it is reasonable to presume, and the NMB accepted as the fact,[21] that some significant number of voters who actually preferred no union at all voted for USPA (a second-best option) only in order to avoid ALPA (the worst option from their point of view).

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[21] See ante, note 10 & accompanying text.

(a) The decision of some employees not to support the outcome they most preferred is quite reasonable, given the NMB's election-procedure. However, this type of voter-behavior raises an important and distortive aspect of the NMB's "majority-of-the-majority" rule: namely, that that rule creates an incentiuve for what is known in the literature of Public Choice as strategic voting behavior, or gaming behavior. Strategic voting behavior occurs when a voter decides to forego voting for his or her most preferred option, in the hope of defeating the least preferred option. If an employee believes that his or her first choice might not win the election, there is a strong incentive to vote for a less desirable choice, and thereby reduce the chances that the least desirable option will win. This means that employees will not necessarily vote for the option they most prefer, and that the election-returns will not reflect the actual rankings of the alternatives by a majority of the employees.

(b) Importantly, because the chances that one union wins is tied directly to the votes for other unions under the NMB's "majority-of-the-majority" rule, strategic voting behavior increases the possibility that the outcome least preferred by the majority will win. In the Federal Express election, if an employee who favored no union representation believed that a majority would vote for either ALPA or USPA, and even though ALPA was his or her least desired outcome, a strategic vote for USPA increased the chances that ALPA would win. In effect, strategic voting intended to avoid the worst-case outcome actually had exactly the opposite effect: it increased the chances that the least preferred option would win. If the union votes were not linked (i.e., under an election-rule other than the "majority-of-the-majority" rule), this would not be the case. A strategic vote for a second-best option would not work to the advantage of the least desired outcome.

26. The extent of strategic voting, and the potential distortions associated with it under the NMB's election-procedures, depend on the employees' expectations about the likely outcome of the election. As a consequence, supporters of the various options have clear incentives to generate misleading information to influence those expectations. Of course, the incentive to produce biased informa-

tion is not unique to NMB elections. However, the direct link between the votes for any union under the "majority-of-the-majority" rule makes the problem of biased and misleading information particularly acute. Information that leads employees to expect that some union will be certified encourages strategic voting. In consequence, this reduces the chances that the majority's preferred outcome will win, and increases the chances that the least preferred outcome will win.

B. A general comparison of alternative voting-rules.

27. Particular examples such as the three presented above can be generalized to determine the efficiency of alternative voting-rules for producing outcomes that accurately reflect the true prederences of the majority of employees. One good way to evaluate different procedures is to compute the percentages of the time that a Condorcet winner is selected by a given procedure. A "Condorcet winner" is defined as the option that defeats all others in pair-wise elections using simple majority rule. For example, in a contest among ALPA, USPA, and No Union, if No Union wins an election against ALPA alone and also wins a second election against USPA alone, then No Union is the Condorcet winner. The Condorcet efficiency rating is the efficiency of a procedure in actually selecting the Condorcet winner when one exists.

28. Condorcet efficiencies have been calculated for several types of election procedures.[22] It is my professional opinion, to a reasonable degree of certainty, that these calculations are correct and represent the present state-of-the-art conclusions in this area published in the relevant literatue.

29. Table 4 compares four voting-rules, using simulations of an electorate of 25 voters with randomly allocated preference

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[22] Merrill, "A Comparison of Efficiency of Multicandidate Electoral Systems", American Journal of Political Science (February 1984), at 23-48; idem, "A Statistical Model for Condorcet Efficiency Based on Simulation Under Spatial Model Assumptions", Public Choice, Vol. 47, No. 2 (1985), at 389-403. See also D.C. Mueller, Public Choice II (1989), at 112-118.

rankings. Because Condorcet efficiency ratings are not sensitive to the number of voters,[23] the results shown in Table 4 will closely approximate the efficiencies for an election with 2,500 voters, such as the NMB held at Federal Express. The four voting-rules compared in Table 4 are defined as follows:

(a) Plurality rule: Choose the option that is ranked first by the largest number of voters in a single election.

(b) Majority rule, run-off election: If one of the options receives a majority of the votes of all eligible voters in the first election, this option is the winner. If not, a second election (a run-off) is held between the two options receiving the most votes in the first election. The option receiving the major-ity vote in the run-off election is the winner.

(c) Approval voting: In an election with m options, each voter votes for k options ($1<k<m$), where k can vary from voter to voter. The option with the greatest number of votes in the winner. For example, consider a three-way race among Options A, B, and C. Each voter may vote for one, two, or all the options, depending on which ones are acceptable. If Voter V approves of Option A, and finds Options B and C unacceptable, he or she would vote only for Option A. If Voter W approves of either Option A or Option B, but finds Option C unacceptable, he or she would vote for Option A and Option B.

(d) The Borda count: Each voter gives each of the m options a score of 1 to m based on the option's ranking in the voter's preference-ordering. That is, the option the voter ranks first receives m points, the second option m-1 points, the third option m-2 points, and so on, with the lowest-ranking option given 1 point. All the voters' points for each option are tallied; and the option with the highest number of points is the winner.

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[23] Merrill, "A Comparison of Efficiency of Multicandidate Electoral Systems", American Journal of Political Science (February 1984), at 24.

30. As Table 4 shows, in an election involving three options, such occurred at Federal Express, a run-off election has a Condorcet efficiency 17.1% higher than a simple plurality election such as the NMB conducted (albeit modified by the "majority-of-the-majority" criterion). It is my professional opinion, to a reasonable degree of certainty, that a 17.1% higher Condorcet efficiency is a substantial difference. In almost one out of five elections, a run-off rule would produce a better outcome than the plurality rule. It is also my professional opinion, to a reasonable degree of certainty, that, presuming the "least-restrictive-means" rule[24] employs the proper scientific criterion derived from the literature of Public Choice, the "majority-of-the-majority" election-procedure the NMB used in the election at Federal Express is not the "least-restrictive means" in comparison to a simple run-off election between ALPA and No Union (the two options that received the most votes).

IV. EXPERIMENTAL RESULTS

31. In addition to performing a theoretical analysis of the NMB's "majority-of-the-majority" rule, I have also designed and conducted three experiments to produce empirical data with which to evaluate the NMB's rule and the NMB's standard ballot. It is my professional opinion, to a reasonable degree of certainty, that these experiments conform to the standards and protocols generally accepted by scholars and researchers in the field of Public Choice and Experimental Economics, and are scientifically reliable means to evaluate the NMB's rule and standard ballot.

32. It is my professional opinion, to a reasonable degree of certainty, that the evidence from the first experiment (described below) demonstrates that under controlled, realistic circumstances voters do <u>not</u> select the most desired outcome using the NMB's "majority-of-the-majority" rule. It is my professional opinion, to a reasonable degree of certainty, that the evidence from the second experiment (described below) demonstrates that under these same circumstances voters select the best outcome using a simple run-off

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[24] <u>See ante</u> ¶ 7(b).

election-procedure. Thus, it is my professional opinion, to a reasonable degree of certainty, that two conclusions follow from these experiments: (i) The NMB's "majority-of-the-majority" rule is a deficient and capricious method for selecting union representation or nonrepresentation. And (ii) a simple alternative procedure such as a run-off rule is superior to the NMB's current procedure.

33. I designed the third experiment (described below) to evaluate the standard ballot used by the NMB.[25] This ballot does not contain an explicit option to vote for "No Union". Instead, employees who prefer no union representation are instructed to abstain from voting (in essence, to return no ballot). It is my professional opinion, to a reasonable degree of certainty, that the evidence from the third experiment demonstrates that the NMB's ballot is defective, for the reasons given below.

34. The details of the experimental procedures are set out in EXHIBIT A attached hereto.

A. Experimental evidence on the NMB's "majority-of-the-majority" rule

35. Experimental procedures. Two voting-rule experiments were conducted and replicated, using two different pools of subjects. One pool of subjects consisted of 71 voters; and the other pool consisted of 31 voters. It is my professional opinion, to a reasonable degree of certainty, that the results obtained with these pools of subjects reflect the results that would be obtained with a pool of 2,500 voters, such as was involved in the election at Federal Express. I did not conduct an experiment with such a large pool because of the logistical problems and costs that would have arisen.

36. Each subject (voter) was given a monetary payoff based on which of the three options won the election: $10 for the first option, $5 for the second option, or $0 for the third option. These payoffs

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[25] See EXHIBIT C attached hereto, and Attachments A-10 and A-11 in EXHIBIT A attached hereto.

established each voter's preferences among the three options, and motivated each subject to vote for his or her preferred option. The payoffs for each outcome and the number of subjects with each payoff are shown in Table 5 for the first experiment and in Table 6 for the second experiment.

37. The ballot-configurations, schedule of payoffs, and number of subjects were identical for both experiments. The only difference between the two experiments was the type of voting-rule used to determine the winning option. The first experiment used the NMB's "majority-of-the-majority" rule. The second experiment used a run-off election.

38. Criterion for evaluating the election outcomes. By experimental design, the best outcome for the pool of subjects is the one that yields the largest total value of payoffs. This is the option that is preferred by the majority of the voters simply because they would receive more money if this outcome wins than if the other two outcomes win. It corresponds to the Condorcet winner (see Paragraph 27, above), the outcome that would defeat all others in pairwise elections.

(a) These values for each of the possible outcomes in the experiment with 71 subjects were as follows:

Option K Wins	Option L Wins	Option M Wins
$230	$315	$520

The total value of the payoffs to the voters if Option M wins is 1.65 times the value if Option L wins, and 2.27 times the value if Option K wins. This ranking establishes the criterion for evaluating which alternative is best, second-best, and third-best from the standpoint of the voters in the first pool of subjects.

(b) The total values of payoffs for each of the possible outcomes in the experiment with 31 subjects were as follows:

Option A Wins	Option B Wins	Option C Wins
$100	$140	$225

The total value of the payoffs to the voters if Option C wins is 1.61 times the value if Option B wins, and 2.25 times the value if Option A wins. This ranking establishes the criterion for evaluating which alternative is best, second-best, and third-best from the standpoint of the voters in the second pool of subjects.

39. Experimental results -- first experiment. The first experiment was conducted using the NMB's "majority-of-the-majority" rule.

(a) As shown in Table 5, in the sample with 71 subjects, 35% voted for Option K; 23% voted for Option L; and 42% voted for Option M. That these actual voting percentages are extremely close to the percentages reflected in the distribution of payoffs shown in Table 5 indicates that the voters understood the instructions and the ballot used, and voted according to their payoffs. (This means that the design and methodology of the experiment appears to be good in practice.) Forty-one subjects (58%) voted for either Option K or Option L. Under the "majority-of-the-majority" rule, Option K won the election with 35% of the total vote; and the value of the total payoff was $230. This shows that, using the "majority-of-the-majority" rule, the least desirable outcome is the winner.

(b) The results in the sample with 31 voters confirm this finding. As shown in the bottom panel of Table 5, 68% of the subjects voted for either Option A or Option B. Option A won under the "majority-of-the-majority" rule with 39% of the vote, notwithstanding that it had the lowest payoff value of the three options. Once again, this shows that, using the "majority-of-the-majority" rule, the least desirable outcome is the winner.

40. Experimental results -- second experiment. The second experiment was conducted under exactly the same conditions with one exception: the subjects were instructed that voting would occur in two rounds. In the second round, a run-off election would be

held between the two options that received the most votes in the first round. It is important to reiterate that the payoffs and the distribution of payoffs among the subjects were identical in the first and second experiments.

(a) As shown in Table 6, for the sample with 71 subjects, in the first round of voting Option K received 31%; Option L received 24%; and Option M received 45%. In the subsequent run-off election, Option K received 37%; and Option M received 63%. Option M won the run-off election; and the value of the total payoff was $520. This shows that, by using a simple run-off rule, voters selected the most desirable outcome, even under the same conditions that produced the least desirable outcome in the first experiment, which used the NMB's "majority-of-the-majority" rule.

(b) The results in the sample with 31 voters confirm this finding. As shown in the bottom panel of Table 6, in the first round of voting Option A received 32%; Option B received 23%; and Option C received 39%. In the run-off election, Option A received 29%; and Option C received 71%. Option C won the run-off election; and the value of the total payoff was $225. Again, a simple run-off rule produced the most desirable outcome, under the same conditions that produced the least desirable outcome when the NMB's "majority-of-the-majority" rule was used.

B. Experimental evidence on the NMB's ballot

41. Experimental procedures. The ballot-design experiment presented the subjects with two alternative ballots. Half of the subjects voted with a ballot that emulated the NMB's standard ballot (such as was used in the election at Federal Express). This NMB-style ballot instructed the subjects who did not prefer the option named on the ballot (or a write-in option) to abstain from voting. The other half of the subjects used an alternative ballot that contained an explicit option for "neither" of the other two named options offered. These two ballots appear as Attachment A-10 and Attachment A-11 to EXHIBIT A. The relevant control in this experiment was that the payoffs to subjects were identical; and the only variable was the configuations of the two ballots.

42. Each subject (voter) was given a payoff according to which of the three options won the election. In order to make the subjects indifferent to which option won, the payoff for each was $5, regardless of the outcome of the election. The purpose of making the subjects indifferent was twofold. First, indifferent subjects have no incentive to "game", or to vote strategically. Second, the results provide evidence to evaluate whether indifferent subjects are more likely to abstain from voting when using the NMB's standard ballot than when using an alternative ballot design. In other words, is the NMB's ballot biased against or in favor of union certification?

43. Criterion for evaluating ballot defects. One of the purposes of this experiment was to test the hypothesis that, if indifferent voters have a tendency to abstain from voting when using the NMB's standard ballot, then that ballot generates a bias against union certification (that is, a bias in favor of a "no union" vote). Indifferent voters are those employees who would be equally satisfied with any result. The problem that is being addressed in whether an indifferent minority may thwart union certification. This concern is valid if at least 51% of this indifferent minority of employees choose to abstain. Under those circumstances, indifference would bias the outcome against the named option (union certification). However, this is not true if less than 51% of the indifferent minority abstain. For example, suppose that one-third of the indifferent voters vote for Option K; one-third vote for Option L; and one-third abstain. Under the NMB's "majority-of-the-majority" rule, which pits the sum of votes for Options K and L against the number of abstentions, a union is more likely to be certified in the presence of indifferent voters. The voting-behavior using the alternative ballot that contains the "neither" option provides a benchmark for comparison.

44. Experimental result. Table 7 presents a breakdown of the election results.

(a) In the experiment with 71 subjects, 35 received the NMB-style ballot; and 36 received the alternative ballot. Of the subjects using the NMB ballot, 31 of the 35 voted for Option K (which was the "named" option on the ballot); 1 voted for Option L (the "write-

in" option); and 3 either abstained or turned in void ballots. Of the 36 subjects using the alternative ballot, 11 voted for Option K; 15 voted for Option L; and 10 voted for "Neither K nor L".

(b) In the experiment with 31 subjects, 15 received the NMB-style ballot; and 16 received the alternative ballot. Of the subjects using the NMB ballot, 11 of the 15 voted for Option A; and 4 either abstained or turned in void ballots. Of the subjects using the alternative ballot, 5 voted for Option A; 5 voted for Option B; and 6 voted for "Neither A nor B".

(c) These data indicate that the NMB's standard ballot does not create a bias toward abstaining, and therefore is not biased against union certification. Instead, the evidence points strongly to the opposite conclusion: the NMB's standard ballot is biased in favor of union certification. In the two experiments, 31 of 35 votes (89%) and 11 of 15 voters (73%) chose the organization explicitly named on the ballot, even though their payoffs were the same for all outcomes (i.e., they were indifferent to the outcome). This highly skewed distribution of votes is not what should occur when the voters are indifferent to the outcome and an unbiased ballot is used. In contrast, voters using the alternative ballot that included an explicit option to vote for "neither" organization distributed their votes almost evenly among the three possible outcomes. An even distribution of voters' choices across the options the payoffs are the same for all outcomes and an unbiased ballot is used.

V. CONCLUSIONS AND SUMMARY REMARKS

45. The theoretical analysis and the empirical evidence discussed above raise serious concerns about the integrity of union certification elections using the NMB's "majority-of-the-majority" rule and standard ballot.

(a) The analytical model shows that election outcomes using the "majority-of-the-majority" rule will not reflect the preferences of the majority of employees under a variety of plausible conditions. The empirical evidence obtained in the election experiments demonstrates that the "majority-of-the-majority" rule can produce

the worst outcome, whereas under the same conditions a simple run-off rule produces the best outcome. Thus, the NMB's use of the "majority-of-the-majority" rule is puzzling, given the rule's relative inefficiency at producing desirable outcomes and the importance of a union certification election. A simple run-off election-procedure is an inexpensive, easily administered alternative to the NMB's current practice; and it is clearly superior in its ability to produce representative outcomes.

(b) Finally, the experimental evidence indicates that the configuration of the NMB's standard ballot is defective. The data demonstrate that the NMB's ballot is biased in favor of union certification. The data also suggest that a simple, inexpensive alternative ballot design that explicitly includes the option for an employee to vote for "No Union" would eliminate the bias inherent in the present standard ballot.

46. In combination, the NMB's "majority-of-the-majority" rule and standard ballot create the potential conditions for the worst of all possible worlds in an election held at Federal Express. With a biased ballot that favors union certification, and the outpouring of information designed to influence expectations that some union would be certified, some employees would reasonably vote for USPA in an effort to defeat ALPA, although those employees would actually prefer a "no union" option to representation by either USPA or ALPA. This interpretation is clearly consistent with the factual data summarized in Paragraph 6, above. If a sufficient number of employees used this voting-strategy, the election of ALPA would not be preferred by the majority of the Flight Deck Crew Members. Because there was no run-off election between ALPA and "no union", there is no certainty that this is the case. The factual context, however, makes it a significant possibility, and raises reasonable and serious doubts that a majority of the employees desires to be represented by ALPA. The most straightforward way to deal with these doubts would be to hold a run-off election between ALPA and "no union" (the two alternatives that received the most votes in the election).

Further Affiant sayeth not.

/s/
WILLIAM MARK CRAIN, Affiant

COMMONWEALTH OF VIRGINIA,
COUNTY OF FAIRFAX: TO WIT,

I hereby certify that on this 14th day of October, 1993, appeared before me, the subscriber, a Notary Public for the Commonwealth of Virginia, the affiant, WILLIAM MARK CRAIN, who made oath in due form of law that he has personal knowledge of the facts and matters set out in the foregoing affidavit, and that the statements contained therein are true, and subscribed his hand thereto.

As witness, my hand and Notarial seal.

/s/ Joan K. Wingblade
NOTARY PUBLIC

My Commission expires 5/31/94.

Table 1. An election in which the wrong union wins (USPA preferred, but ALPA wins).

Options	Voters' Rankings of Alternatives(*)					Number of Votes "For" in:			
	Voter V	Voter W	Voter X	Voter Y	Voter Z	(1) *NMB Election*	(2) *ALPA vs. No Union*	(3) *ALPA vs. USPA*	(4) *USPA vs. No Union*
ALPA	1	1	3	3	2	2	3	2	—
USPA	2	2	2	2	1	1	—	3	3
NO UNION	3	3	1	1	3	2	2	—	2
						Winner	**Union Wins ALPA**	**ALPA**	**USPA**	**USPA**

(*) Note:

"1", "2", and 3" refer to each voter's first choice, second choice, and third choice.

Table 2. An election in which the wrong union wins (ALPA preferred, but USPA wins).

Options	Voters' Rankings of Alternatives(*)					Number of Votes "For" in:			
	Voter V	Voter W	Voter X	Voter Y	Voter Z	(1) *NMB Election*	(2) *ALPA vs. No Union*	(3) *ALPA vs. USPA*	(4) *USPA vs. No Union*
ALPA	2	2	2	2	1	1	3	3	---
USPA	1	1	3	3	2	2	---	2	3
NO UNION	3	3	1	1	3	2	2	---	2
Winner						Union Wins USPA	ALPA	ALPA	USPA

(*) Note:

"1", "2", and 3" refer to each voter's first choice, second choice, and third choice.

Table 3. An election in which the wrong union wins, and the majority prefers no union.

Options	Voters' Rankings of Alternatives(*)					Number of Votes "For" in:			
	Voter V	Voter W	Voter X	Voter Y	Voter Z	(1) *NMB Election*	(2) *ALPA vs. No Union*	(3) *ALPA vs. USPA*	(4) *USPA vs. No Union*
ALPA	1	1	3	3	3	2	2	2	---
USPA	3	3	2	2	1	1	---	3	1
NO UNION	2	2	1	1	2	2	3	---	4
						Winner	**Union Wins ALPA**	**No Union USPA**	**No Union**

(*) *Note:*

"1", "2", and 3" refer to each voter's first choice, second choice, and third choice.

Table 4. Condorcet Efficiency of Alternative Voting Rules

	Number of Options on Ballot		
Voting System	3	4	5
Plurality	79.1%	69.4%	62.1%
Runoff	96.2%	90.1%	83.6%
Approval	76.0%	69.8%	67.1%
Borda	90.8%	87.3%	86.2%

Source: Merrill (1984, p. 28)

Table 5. Experimental Evidence on the NMB's Voting Rule.

For Sample With 71 Subjects: Options were K, L, and M.

Incentive Order From Payoffs	Distribution of Payoffs Among Subjects: Number	Percent
K=$10; M=$5; L=$0	23	32%
L=$10; M=$5; K=$0	15	21%
M=$10; L=$5; K=$0	33	46%

Option	Distribution of Votes Number	Percent	Total Payout Value if Option Wins
K	25	35%	$230
L	16	23%	$315
M	30	42%	$520
Subtotal: K plus L	41	58%	

Winner Under Majority-of-the-Majority Rule: K

[Table 5. continued]

For Sample With 31 Subjects: Options were A, B, and C.

Incentive Order From Payoffs	Distribution of Payoffs Among Subjects: Number	Percent
A=$10; C=$5; B=$0	10	32%
B=$10; C=$5; A=$0	7	23%
C=$10; B=$5; A=$0	14	45%

Option and Total Value of Payoffs	Distribution of Votes Number	Percent	Total Payout Value if Option Wins
A	12	39%	$100
B	9	29%	$140
C	10	32%	$225
Subtotal: A plus B	21	68%	

Winner Under Majority-of-the-Majority Rule: A

Table 6. Experimental Evidence Using a Run-Off Voting Rule.

For Sample With 71 Subjects: Options were K, L, and M.

Individual Voter Based on Payoffs	Distribution of Payoffs Among Subjects: Number	Percent
K=$10; M=$5; L=$0	23	32%
L=$10; M=$5; K=$0	15	21%
M=$10; L=$5; K=$0	33	46%

Option and Total Value of Payoffs	Distribution of Votes: Round One Number	Round One Percent	Run-Off Number	Run-Off Percent
K: $230	22	31%	26	37%
L: $315	17	24%		
M: $530	32	45%	45	63%

Winner Under Run-Off Rule: M

[Table 6. Continued]

For Sample With 31 Subjects: Options were A, B, and C.

Incentive Order From Payoffs	Distribution of Payoffs Among Subjects: Number	Percent
A=$10; C=$5; B=$0	10	32%
B=$10; C=$5; A=$0	7	23%
C=$10; B=$5; A=$0	14	45%

Option and Total Value of Payoffs	Distribution of Votes: Round One Number	Round One Percent	Run-Off Number	Run-Off Percent
A $100	10	32%	9	29%
B $140	9	29%		
C $225	12	39%	22	71%

Winner Under Run-Off Rule: C

Table 7. Experimental Evidence on the NMB's Ballot Design.

For Sample With 71 Subjects		
35 Voters with NMB-Style Ballot (*)	Distribution of Votes Number	Percent
K	31	89%
Blank	1	3%
Void Ballots	3	9%
36 Voters with "Neither" Ballot Option (**)	Distribution of Votes Number	Percent
K	11	31%
L	15	42%
Neither K nor L	10	28%

For Sample With 31 Subjects		
15 Voters with NMB-Style Ballot (*)	Distribution of Votes Number	Percent
A	11	73%
Blank	2	13%
Void Ballots	2	13%
16 Voters with "Neither" Ballot Option (**)	Distribution of Votes Number	Percent
A	5	31%
B	5	31%
Neither A nor B	6	38%

Notes:

(*) The NMB-style ballot is displayed in Attachment A-10.

(**) The ballot with the "Neither" option is displayed in Attachment A-11.

EXHIBIT A: EXPERIMENTAL PROCEDURES

Existing experimental procedures serve as the guidelines for the three experiments. While there are differences among propositions tested in laboratory settings, similar procedures have been established (Plott, 1991). Where appropriate, these experiments mimicked procedures already used. Because these experiments are unique in the sense that identical experiments are not in the literature, some original design was required. All procedures are documented in this Appendix.

1. Subject Recruitment and Sample Pools

George Mason University students served as the subject pool for these experiments. The experiments were first run on 15 September 1993 and the first sample pool consisted of 31 students in an undergraduate economics course. All experiments were replicated on 22 September 1993 and the second sample pool consisted of 71 students recruited from undergraduate biology courses.[FN*]

[FN*]"The differences among subject pools have not been sufficient to motivate intensive testing of different pools." (Plott, 1988) While subject pools have varied from high school students to employed adults, in the experimental economics literature subjects are typically college students.

The recruitment pitch is shown on Attachment A-1.

2. Verbal Instructions to Subjects and Ballot Instructions

The explanation and introductory remarks given to the subjects at the beginning of each experimental session are shown in Attachment A-2. The verbal instructions given to the subjects before beginning the first experiment are shown in Attachment A-3.

The verbal instructions for the first experiment are shown in Attachment A-4, and the ballots used in the first experiment are displayed in Attachment A-5. The verbal instructions for the second experiment are shown in Attachment A-6, the ballot is displayed in Attachment A-7, and payoff sheet experiment is displayed in Attachment A-8. The verbal instructions for the third experiment are shown in Attachment A-9, and the two ballots used in the third experiment are displayed in Attachment A-10 and Attachment A-11.

Attachment A-1:

Recruiting Pitch for Voting Experiment

My name is _____. I am interested in models and group decision making processes and I am working with a professor in the Economics department.

We are conducting experiments on campus to help us understand some technical aspects of group decision making. We would like to ask you to participate in a meeting next Wednesday at 2:30, a meeting like many of you have probably attended. There will be a number of alternatives to be considered and decided among by the group through voting. You will be paid cash for participating in this meeting (economists are sensitive about that sort of thing!). I cannot tell you specifically how much, but it can be a considerable sum -- more than anyone here is likely to be making at any job for a similar period of time. We have never had any complaints about the amount of payment from previous participants.

I would like to emphasize that we are economists and political scientists, not psychologists. We are not interested in your intelligence, your personality, your mother, or anything in your background. There will be no electrodes, no measurements of punishment; we are interested in absolutely nothing of a psychological nature, but rather in technical aspects of political and economic processes. There will be no hard problems to solve and no debates of current events or controversial social issues. You will simply be given a series of trivial alternatives and asked to decide and vote.

So, we are asking for volunteers to attend a meeting next Wednesday, September 22nd at 2:30 in Thompson room T138. Please volunteer only if you are reasonably sure you can show up on time and stay for the entire meeting; in the past, these have lasted about an hour or a little longer. If we do not have the right number of people, we cannot hold a meeting. We usually sign up one or two extras in case someone forgets to come. If by some chance you show up on time but all the places are taken, we will pay you $10 just for coming.

Are there any questions?

Surely you can't absorb such an outlandish proposal without some questions...

Purpose?

For us, each meeting will become data for our study of certain technicalities of decision making which are probably too involved to discuss now; for you, it is a chance to make some easy money and participate in a somewhat interesting meeting.

What Technicalities?

We really can't explain in greater detail. To do so would contaminate the environment.

If you would like to volunteer, please write your name and student number on a piece of paper which I will pick up. I will give you a reminder card with the date, time, and room number of the experiment.

Attachment A-2:

Explanation for Subjects Once They are Seated

My name is Mark Crain. I am interested in voting models and group decision making processes, and the experiments we will begin shortly are designed to help us understand some technical aspects of group decision making.

You will be paid cash for participating [hold up cash]. I cannot tell you specifically how much, but it can be a considerable sum -- more than anyone here is likely to be making at any job for a similar period of time. We have never had any complaints about the amount of payment from previous participants.

I would like to emphasize that we are economists and political scientists, not psychologists. We are not interested in your intelligence, your personality, your mother, or anything in your background. There will be no electrodes, no measurements of punishment; we are interested in absolutely nothing of a psychological nature, but rather in technical aspects of political and economic processes. There will be no hard problems to solve and no debates of current events or controversial social issues. You will simply be given a series of trivial alternatives and asked to decide and vote.

Please participate only if you are sure you can remain for the entire meeting; in the past, these have lasted about an hour.

Purpose?

For us, each meeting will become data for our study of certain technicalities of decision making which are probably too involved to discuss now; for you, it is a chance to make some easy money and participate in a somewhat interesting meeting.

What Technicalities?

We really can't explain in greater detail. To do so would contaminate the environment.

Attachment A-3:

Explanation for Subjects Once they are Seated and Ready to Begin

Several experiments will be run, and each is completely independent. Please use the pens provided to vote. It is in your best interest not to try to use information from one experiment to help you decide how to vote in another experiment.

Before we begin a voting round, please fill out some information on the index card you have in front of you. We are paying you $5 for this information. Please write your name, student number, age, sex, and ethnicity (hispanic, white, black, oriental, other) on the side of the card with lines. This information will only be used to create an aggregate demographic profile of our sample pool.

On the reverse side of the card you will record how you voted in each experiment, and you will trade it in (when we are finished) for cash. How much cash depends on how you vote and which option wins.

Attachment A-4:

Instructions for "Majority-of-the-Majority" Voting Rule Experiment

We will now distribute ballots for the first experiment. Please keep them face down until you are instructed to begin.

[Hand out ballots.]

Please turn over your ballot. Everyone should have received a ballot with your individual payoff listed on the first few rows at the top. All the information you need is listed on the form. You have 3 minutes to vote, after which the timer will ring and the ballots will be collected. Please begin now.

[Ring]

Please copy your choice onto your index card. After you have recorded your vote pass your ballots to the front of your row. Be sure to keep your index card.

[Pick up ballots]

Attachment A-5

YOUR PAYOFF, EXPERIMENT #2:

$ 10 If ORGANIZATION K Wins, or
$ 5 If ORGANIZATION M Wins, or
$ 0 If ORGANIZATION L Wins.

OFFICIAL BALLOT

Voting Instructions:

Vote for only ONE alternative by marking the appropriate square. If you mark more than one square or otherwise spoil the ballot, you may return the spoiled ballot and obtain a new one. This is a secret ballot; do not sign your name.

If you desire to be represented by: ORGANIZATION K

Mark an "X" in this square ---------- ☐

If you desire to be represented by: ORGANIZATION L

Mark an "X" in this square ---------- ☐

If you desire to be represented by: ORGANIZATION M

Mark an "X" in this square ---------- ☐

YOUR PAYOFF, EXPERIMENT #2

$ 10 If ORGANIZATION M Wins, or
$ 5 If ORGANIZATION L Wins, or
$ 0 If ORGANIZATION K Wins.

OFFICIAL BALLOT

Voting Instructions:

Vote for only ONE alternative by marking the appropriate square. If you mark more than one square or otherwise spoil the ballot, you may return the spoiled ballot and obtain a new one. This is a secret ballot; do not sign your name.

If you desire to be represented by: ORGANIZATION K

Mark an "X" in this square ---------- ☐

If you desire to be represented by: ORGANIZATION L

Mark an "X" in this square ---------- ☐

If you desire to be represented by: ORGANIZATION M

Mark an "X" in this square ---------- ☐

YOUR PAYOFF, EXPERIMENT #2

$ 10 If ORGANIZATION L Wins, or
$ 5 If ORGANIZATION M Wins, or
$ 0 If ORGANIZATION K Wins.

OFFICIAL BALLOT

Voting Instructions:

Vote for only ONE alternative by marking the appropriate square. If you mark more than one square or otherwise spoil the ballot, you may return the spoiled ballot and obtain a new one. This is a secret ballot; do not sign your name.

If you desire to be represented by: ORGANIZATION K

Mark an "X" in this square ---------- ☐

If you desire to be represented by: ORGANIZATION L

Mark an "X" in this square ---------- ☐

If you desire to be represented by: ORGANIZATION M

Mark an "X" in this square ---------- ☐

Attachment A-6:

Instructions for Run-Off Rule
Election Experiment

We will now distribute ballots for the second experiment. Please keep them face down until you are instructed to begin. This is a new experiment. Information from the last experiment is no longer relevant.

[Hand out ballots, incentive sheets.]

Everyone should have received a ballot and a yellow sheet with your individual payoff. This vote will take place in two rounds, called a run-off election. Whichever organizations place first and second in the first round will be paired against each other in the second round. Your payoff depends on who wins the second round. All other information you need is listed on your ballot and incentive sheet. Please turn over your two pages. Before we begin, please copy the number on the bottom of your incentive sheet onto your ballot. You have 3 minutes to vote, after which the timer will ring and the ballots will be collected. Please begin now.

[Ring]

Please pass your ballots to the front of your row. Keep the yellow incentive sheet and please turn the incentive sheet face down.

[Pick up ballots, count them.]

[Begin passing out new ballots.]

Ballots are now being distributed for the run-off election. Please keep them face down until I instruct you to turn them over. All the information you need is listed on your ballot and incentive sheet. Before we begin, please copy the number on the bottom of your incentive sheet onto your ballot. You have 3 minutes to vote, after which the timer will ring and the ballots will be collected.

[Ring]

Please copy your choice onto your index card. After you have recorded your vote pass your ballot and payoff sheet to the front of your row. Be sure to keep your index card.

[Pick up ballots, count them]

Attachment A-7

OFFICIAL BALLOT
(Round One)

Voting Instructions:

Vote for only ONE alternative by marking the appropriate square. If you mark more than one square or otherwise spoil the ballot, you may return the spoiled ballot and obtain a new one. This is a secret ballot; do not sign your name.

Voting Information:

This is a run-off election. Whichever two organization place first and second in this vote will then be run against each other. You will be paid depending on who wins in the second round of voting.

If you desire to be represented by: ORGANIZATION K

Mark an "X" in this square ---------- ☐

If you desire to be represented by: ORGANIZATION L

Mark an "X" in this square ---------- ☐

If you desire to be represented by: ORGANIZATION M

Mark an "X" in this square ---------- ☐

OFFICIAL BALLOT
(Round Two)

Voting Instructions:

Vote for only ONE alternative by marking the appropriate square. If you mark more than one square or otherwise spoil the ballot, you may return the spoiled ballot and obtain a new one. This is a secret ballot; do not sign your name.

Voting Information:

This is the second round in the run-off election. You will be paid depending on who wins in this round of voting.

If you desire to be represented by: ORGANIZATION K

Mark an "X" in this square ---------- ☐

If you desire to be represented by: ORGANIZATION M

Mark an "X" in this square ---------- ☐

Attachment A-8

YOUR PAYOFF round one and two, EXPERIMENT #3:

$ 10 If ORGANIZATION L Wins, or
$ 5 If ORGANIZATION M Wins, or
$ 0 If ORGANIZATION K Wins.

YOUR PAYOFF for voting round one and two, EXPERIMENT #3:

$ 10 If ORGANIZATION M Wins, or
$ 5 If ORGANIZATION L Wins, or
$ 0 If ORGANIZATION K Wins.

YOUR PAYOFF round one and two, EXPERIMENT #3:

$ 10 If ORGANIZATION K Wins, or
$ 5 If ORGANIZATION M Wins, or
$ 0 If ORGANIZATION L Wins.

Attachment A-9:

Instructions for Experiment Ballot
Design Experiment

We will now distribute ballots for the first set of alternative choices. Please keep them face down until you are instructed to begin. This is a new experiment. Information from the last experiments is no longer relevant.

[Hand out ballots.]

Everyone should have received a ballot with your individual payoff listed on the first few rows at the top. All the information you need is listed on the form. You have 4 minutes to vote, after which the timer will ring and the ballots will be collected. Please begin now.

[Ring]

Please copy your choice onto your index card. After you have recorded your vote pass your ballots to the front of your row. Be sure to keep your index card.

[Pick up ballots]

Attachment A-10

YOUR PAYOFF, EXPERIMENT #1:

$ 5 If ORGANIZATION K Wins, or
$ 5 If ORGANIZATION L Wins, or
$ 5 If neither ORGANIZATION K nor ORGANIZATION L wins.

OFFICIAL BALLOT

A dispute exists as to who are the representatives of employees and are designated and authorized in accordance with the requirements of the Railway Labor Act. This is a SECRET BALLOT taken in order to ascertain and to certify the name or names of organizations designated and authorized for purposes of the Railway Labor Act.

INSTRUCTIONS FOR VOTING

No one is required to vote. If less than a majority cast ballots, neither K nor L will be certified. Should a majority vote be represented, K or L (whichever receives a majority of the votes cast) will be certified.

If you desire to be represented by: ORGANIZATION K

Mark an "X" in this square ---------- ☐

If you desire to be represented by:
ANY OTHER ORGANIZATION
Write name of such organization on the line below:

_____ AND

Mark an "X" in this square ----------

NOTICE

1. This is a SECRET BALLOT DO NOT SIGN YOUR NAME
2. Marks in more than one square make ballot void.
3. Do not cut, mutilate or otherwise spoil this ballot. If you accidentally do so, you may return the spoiled ballot at once and obtain a new one.

Attachment A-11

YOUR PAYOFF, EXPERIMENT #1

$ 5 If ORGANIZATION K Wins, or
$ 5 If ORGANIZATION L Wins, or
$ 5 If neither ORGANIZATION K nor ORGANIZATION L wins.

OFFICIAL BALLOT

Voting Instructions:

Vote for only ONE alternative by marking the appropriate square. If you mark more than one square or otherwise spoil the ballot, you may return the spoiled ballot and obtain a new one. This is a secret ballot; do not sign your name.

If you desire to be represented by: ORGANIZATION K

Mark an "X" in this square ---------- ☐

If you desire to be represented by: ORGANIZATION L

Mark an "X" in this square ---------- ☐

If you **do not** desire ORGANIZATION K or ORGANIZATION L,

Mark an "X" in this square ---------- ☐

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CAREER DATA

George Mason University	1982-
Professor of Economics, Tenured	1986-
Research Associate, Center for Study of Public Choice	1982-
Director, Center for Economic Education	1989-
Deputy Chairman, Department of Economics	1989-90
Director, Economics Graduate Program	1982-87
Associate Professor, Tenured	1982-86
U.S. Office of Management and Budget	
Special Assistant to the Director	1987-88
Virginia Polytechnic Institute and State University	1976-82
Associate Professor, Tenured	1979-82
Research Fellow, Center for Study of Public Choice	1976-82
Assistant Professor	1976-79
University of California, Los Angeles	
Visiting Assistant Professor, Department of Economics	1978-80

Exhibit B

CIVIC DUTIES

County of Fairfax, Virginia
Privatization Oversight Committee, Chairman 1992-
Committee on Fiscal and Spending Priorities 1991-92

Commonwealth of Virginia
Transportation Revenue Advisory Panel 1990-

Office of the President-Elect
Transition Team for U.S. Department of Energy 1988-89

EDUCATION

Ph.D., Texas A&M University (Economics) 1976
"Outstanding Graduate Student Award for Research" (from Former Student Association) 1976

B.S., University of Houston (Economics) 1972

PUBLICATIONS

Books and Edited Volumes

Vehicle Safety Inspection Systems: How Effective?, Washington, D.C.: American Enterprise Institute, April 1980.

The Impact of High Technology on Labor, Co-Edited with Brack Brown, Fairfax, VA: George Mason University Press, 1983.

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Public Opinion Polls

Public Attitudes Towards Public Education in Virginia, with J.Wade Gilley, January 4, 1985.

A Report on Virginia Attitudes Towards Higher Education, with J.Wade Gilley, February 12, 1985.

Virginia Attitudes Toward Higher Education — A Special Report on Community Colleges, with J.Wade Gilley, February 12, 1985.

Book Reviews

Politics without Apology" (a review of *Who Profits: Winners, Losers and Government Regulation*, by Robert A. Leone (Basic Books, Inc., 1986), *Regulation No. 1* (1987), 248.

DISSERTATIONS DIRECTED

Chamborlias E. Kourtidis, "Growth, Volatility, and International Investment Flows," George Mason University, 1993.

Charles Y. Mensah, "Fiscal Policy and the Choice of Institutions," George Mason University, 1991.

Oladipo A. Oyefusi, "The Political Economy of Electric Utilities," George Mason University, 1991.

Harold C. Messenheimer, "The Risk of Losing: Economics of Representation and Voter Volatility," George Mason University, 1989

Lydia D. Ortega, "An Economic Theory of Conference Committees," George Mason University, 1988

Richard J. Grant, "Influence-Generating Technologies and Constitutional Change," George Mason University, 1987

Donald R. Leavens, "Legislator Compensation and the Determinants of Congressional Action," George Mason University, 1984

PERSONAL DATA

Born June 14, 1951 in Port Arthur, Texas
Married, One Child
United Methodist
Jogger
Who's Who Among Rising Young Americans (1991-1993)

UNITED STATES OF AMERICA

OFFICIAL BALLOT OF NATIONAL MEDIATION BOARD

[SEAL OMITTED] Involving CASE NO. VOID

Employees of

FEDERAL EXPRESS CORPORATION

A dispute exists among the above named craft or class of employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of the Railway Labor Act. The National Mediation Board is taking a SECRET BALLOT in order to ascertain and to certify the name or names of organizations or individuals designated and authorized for purposes of the Railway Labor Act.

INSTRUCTIONS FOR VOTING

No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified. Should a majority vote to be represented, the representative which receives a majority of the votes cast will be certified.

If you desire to be represented by: Air Line Pilots Association

Mark an "X" in this square ..... ☐

If you desire to be represented by:
ANY OTHER ORGANIZATON OR INDIVIDUAL
Write name of such organizaton or individual on the line below:

_____ AND

Mark an "X" in this square ..... ☐

Exhibit C

NOTICE

1. This is a SECRET BALLOT. DO NOT SIGN YOUR NAME.
2. Marks in more than one square make ballot void.
3. Do not cut, mutilate or otherwise spoil this ballot. If you should accidentally do so, you may return the spoiled ballot at once to the Mediator and obtain a new one.

U.S. GPO: 1989-246-341

SAMPLE

USPA
United States Pilots Association, Inc.
P.O. Box 503
Cordova, TN 38018-0503
901-377-2823 MESSAGE LINE

LETTER NO. 4

A "NO" VOTE...
IS A VOTE FOR ALPA!

WRITE US IN!
USPA
THE INDEPENDENT CHOICE

A "NO" VOTE...IS A VOTE FOR ALPA!

WHEN THE BALLOT ARRIVES...
WRITE USPA IN!

Cut along dashed line. Detach and mail with your remittance.

USPA MEMBERSHIP APPLICATION

Yes! I wish to join the United States Pilots Association. Write me in! I have enclosed a check in the amount of $100.00 to cover my initiation fee. Here's my information...

Name _____ Employee #_____

Address_____

City_____ ST _____ZIP_____

PHONE 1_____PHONE 2_____

Beeper_____Cellular_____

Domicile_____ Seat_____Aircraft Type_____

☐ Call me. I would like to volunteer my time to assist USPA in whatever way I can!

Exhibit D

HIGHLIGHTS OF THE UNITED STATES PILOTS ASSOCIATION CONSTITUTION AND BY-LAWS

- Membership ratification of all basic collective bargaining agreements, guaranteed.
- Provision to recall Association officers.
- Procedure for filing complaints and grievances against the Association.
- Ability to dissolve the Association.
- Constitution and By-laws amendment process, including special inaugural procedure.
- "Conflict of interest" clause prevents pilots from immediately "flip-flopping" between Association Officer positions and management, and vice versa.
- Provisional 2.5% dues rate until ratification of first contract, then decreasing to 1.5%, pending final determination of dues rates by vote of the membership.
- Membership approval of assessments, if any.
- Contract Negotiating Committee comprised of a Captain, a First Officer and a Second Officer
- Assistance to members in the event of FAA Certificate action, NTSB safety investigation and/or company disciplinary proceedings.
- Numerous checks and balances between Executive Officers and Board of Directors to prevent abuse of power.
- Local control and autonomy, guaranteed.
- No offsite union hierarchy.
- No assessments unless you approve them.
- Complete control of dues structure.
- Complete control of dues. You write the checks, you determine how to spend the money.
- Complete control of your agenda.

USPA vs. ALPA — THE CONSTITUTION AND BY-LAWS TELL THE DIFFERENCE

TWELVE UNDENIABLE TRUTHS OF LIFE FOR FED EX PILOTS

1. This pilot force has absolutely no meaningful input into the amount it is paid or the methodology used to determine its pay.

2. The pilot force is "married" to Federal Express. Pilots may never financially recover if they have to start over at another company, if fortunate enough to find employment at another airline. Most other employees can laterally transfer to another company. Pilots start at the bottom of another company's seniority list.

3. Crewmembers at FedEx have absolutely no meaningful input into the benefits they receive. In fact, the Employees Benefits Handbook says, "Federal Express reserves the right to terminate, modify or suspend any plan or program".

4. Without a collectively bargained agreement, we cannot achieve any significant improvements in our retirement.

5. There is absolutely no evidence to support the assertion that a better contract could be negotiated more quickly using the support of a national labor union.

6. To negotiate a credible contract, this pilot force must stand solidly behind its collective bargaining representative.

7. This pilot force has the talent, intelligence, determination and resources to face any challenge, including running its own union.

8. In the event a pilot crew survives a serious aircraft mishap, in which life or significant property is lost, an immediate conflict of interest will exist if the pilot relies on Company legal counsel during NTSB investigations and/or FAA certificate actions.

9. Without a collectively bargained agreement including a successorship clause, the interests of this pilot force are completely unprotected in the event of a takeover, buyout or merger with another company.

10. Without a collectively bargained agreement including a valid "scope" clause, the careers of this pilot force are unilaterally controlled by management.

11. FedEx is the finest express carrier in the business, and the pilots who support USPA have no intention of harming the company that indirectly puts food on the table, pays the mortgage, and helps our children through college. This pilot force will continue to be loyal, productive and dedicated employees after it has elected a collective bargaining representative.

12. To vote "NO" at this time, will ensure that the Air Line Pilots Association is certified as our bargaining agent.

USPA 901-377-2823
United States Pilots Association, Inc. P.O. Box 503, Cordova, TN 38018-0503

November 3, 1992

Dear Fellow Pilots:

The response to our first letter has been overwhelming! A coalition of independent, ALPA, FAB, and nonunion supporters is growing stronger. This pilot group is unifying. *But we still have a way to go in achieving 100% membership in USPA.* Let's discuss some frequently asked questions:

1. *Is this organization sponsored by, or in any way related to ALPA? related to the Company?*

No. No. And emphatically no! We have hired the best independent union law firm in the country. *Seham, Klein and Zelman* would not have taken this case on a "contingency basis" if they thought this independent effort couldn't succeed. We have incorporated as a nonprofit organization in the State of Delaware as a union of pilots.

It is inconceivable that the Company would recognize any union, especially during an NMB investigation.

2. *Is a vote for USPA a vote for ALPA?*

No. According to NMB rules, if the majority of pilots votes for union representation, then the union that receives the majority of votes cast becomes the representative for the pilots.

3. *What if I vote "NO" again?*

Given the closeness in the last election, we feel the option of two unions makes representation inevitable. **To vote NO at this point is in fact a vote for ALPA!** The choice is yours.

4. *Why didn't you start this movement months ago?*

Legal counsel advised in February of this year that the NMB would likely restrict participation in a new election to those organizations who participated in the last election--specifically, ALPA. When the NMB issued their recent decision, they specified

a "standard ballot." This kind of ballot allows for a write-in vote in the space titled "any other organization." Another alternative is now available.

5. *How did you select the law firm that represents UPSA?*

Seham, Klein and Zelman have a proven track record representing the American and UPS pilots.

6. *Don't you expect the first contract negotiations to be expensive?*

Yes, but not insurmountable. For example, the UPS pilots started with 4% of gross for the first six months, 3% during contract negotiations, and 1.5% upon contract ratification. Bear in mind that these rates were for a pilot force numbering approximately 800 with lower average earnings. You will decide our dues structure. Please read the attached letter from IPA President Bob Miller, of UPS, which describes their experience with independent representation. The front-end costs are worth the investment.

The choice is yours. This organizing committee is not empire building. An independent organization is an autonomous structure responsible to no one but **US.** What you get out of this is equal to what you put into it. Time is short. USPA needs your membership, your write-in vote, your financial commitment, and above all, your moral support. ***Where the ballot says: "or other organization," write in the <u>UNITED SATES PILOTS ASSOCIATION (USPA)</u>. Call your friends and spread the word!***

USPA ORGANIZING COMMITTEE

/s/	/s/	/s/
GARY LOVAN	LES COREN	JOE VINCENT

/s/
MARK ESTABROOK

Supreme Court, U.S.
FILED
FEB 21 1996
CLERK

No. 95-1175

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JOSE R. BRAVO, *et al.*,
Petitioners,
v.

NATIONAL MEDIATION BOARD and
AIR LINE PILOTS ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENT AIR LINE PILOTS ASSOCIATION

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IN THE

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AIR LINE PILOTS ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF RESPONDENT AIR LINE PILOTS ASSOCIATION

Respondent Air Line Pilots Association ("ALPA") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the District of Columbia Circuit in this case.

STATEMENT OF FACTS

1. *The NMB Balloting Process And The Contested Rerun Election*

This case arises out of petitioners' challenge to the National Mediation Board's ("NMB" or "Board") June 14, 1993 certification of ALPA as the exclusive representative of pilots employed by Federal Express Corporation ("FedEx"). A. 30a-79a.[1] Petitioners are supporters

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[1] Record citations are to materials reprinted in the Appendix ("A.").

of the Federal Express Pilots For A Non-Union Operation, Inc. ("FEPNO"). The challenged certification is the result of a rerun election ordered by the NMB after it upheld ALPA's objections to an earlier election in August, 1991. A. 90a-134a, 150a.

The NMB mailed its standard ballots on December 3, 1992 and tabulated the results on January 14, 1993, using the decades-old standard NMB balloting procedure. Under this procedure, if a majority of eligible voters cast valid ballots for union representation, the union that receives the majority of valid ballots is certified. Those failing to return ballots are presumed to vote against any representation, and if less than a majority casts ballots, the NMB certifies no representative. A. 149a at ¶ 18; A. 82a n.1, 88a n.1.[2]

Under the NMB standard balloting rules, ALPA was certified as the representative because a majority of eligible voters cast ballots for union representation and ALPA received the majority of those votes.

2. *The Proceedings Below*

On October 15, 1993, FEPNO filed the Complaint in this action (A. 144a-166a) to set aside the Board's certification of ALPA. Petitioners assert that (1) the NMB had violated the right of FedEx pilots to be governed by the decision of the "majority of any craft or class of employees" under Railway Labor Act ("RLA") Section 2 Fourth, 45 U.S.C. § 152, Fourth, because ALPA was certified based on the votes of the majority of employees who voted for representation, rather than the votes of an absolute majority of all eligible voters, and (2) this certification violated the First and Fifth Amendment rights of FedEx pilots who opposed ALPA representation.

In support of both of these claims, FEPNO relied exclusively upon opinion testimony in the form of an

---

[2] Petitioners refer to this standard NMB balloting procedure as the "majority-of-the-majority" rule.

affidavit (A. 168a-194a) from William Mark Crain, a political scientist, who criticized the Board's balloting procedures, arguing that they lead to "strategic voting" and "perverse" outcomes when there are more than two ballot choices, resulting in a "bias" in favor of union certification. A. 180a-183a at ¶¶ 15-25(b). Crain asserted that other balloting procedures would better gauge the "true preferences" of voters in multi-union elections. *See, e.g.*, A. 178a-179a at ¶¶ 11-14, 189a-190a at ¶ 40.

After ALPA's unopposed motion to intervene was granted, both ALPA and the NMB moved to dismiss or in the alternative for summary judgment. FEPNO filed a cross-motion for summary judgment.

By Memorandum Order dated October 21, 1994 (A. 4a-22a), the district court granted defendants' motion to dismiss, concluding that controlling precedent precluded FEPNO's statutory and constitutional attacks, noting that over thirty years ago this Court had, in reviewing the NMB's standard ballot and balloting procedure, concluded that: "the selection of a ballot is a necessary incident of the Board's duty to resolve disputes. The Act expressly says as much, instructing the Board alone to establish the rules governing elections. Thus, it is clear that its decision on the matter is not subject to review where there is no showing that it has acted in excess of its statutory duty." A. 15a, quoting *Bhd. of Ry. & S.S. Clerks v. Ass'n for the Benefit of Non-Contract Employees* ("*BRAC*"), 380 U.S. 650, 669 (1965). The district court further concluded that FEPNO's constitutional claims were "without merit," since the courts have repeatedly cast aside similar challenges to the Board's long-established balloting processes. A. 20a-22a.

On October 25, 1995, in a memorandum judgment (A. 1a-3a), the District of Columbia Circuit concluded that petitioners' arguments "do not require an opinion" and "affirmed in full" the district court's decision, concluding that "[o]ne sparse study offered by petitioners

does not approach th[e] threshold" of demonstrating either a gross statutory violation or an error of "constitutional dimension," as is necessary to disturb the Board's exclusive jurisdiction. A. 2a.

REASONS WHY THE PETITION SHOULD BE DENIED

Over fifty years ago, in *Switchmen's Union of North America v. NMB*, 320 U.S. 297 (1943), this Court ruled that NMB certifications are unreviewable. The Court held that Congress intended a representational dispute "to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law." *Id.* at 304-05. More than thirty years ago, the Court confirmed that this jurisdictional limitation applies to the Board's selection of balloting procedures, and expressly approved the standard balloting procedure challenged here. *BRAC*, 380 U.S. 650 (1965). These authorities have been uniformly followed, as they were by the courts below; petitioners offer no basis for reconsideration or reversal of these settled holdings.

I. THE RULINGS BELOW ARE CONSISTENT WITH THE SETTLED LAW OF THIS COURT UPHOLDING THE CHALLENGED BALLOTING PROCEDURES.

Board certification decisions are subject to review *only* if the Board's determination is "made in excess of its delegated powers and contrary to a *specific prohibition in the Act*." *BRAC*, 380 U.S. at 660 (quoting *Leedom v. Kyne*, 358 U.S. 184, 188 (1958)) (emphasis in original). As the lower courts in this case determined, petitioners can make no such showing, as the statute leaves it entirely up to the Board under Sections 2, Fourth and Ninth to determine what constitutes a "majority." *See id.* at 659. Similarly, the selection of balloting procedures and the other rules governing elections are "left for the final determination of the Board" alone. *Id.* at 669. Indeed,

> [*N*]*ot only does the statute fail to spell out the form of any ballot that might be used but it does not even require selection by ballot.* It leaves the details to the broad discretion of the Board with only the *caveat* that it 'insure' freedom from carrier interference.

Id. at 668-69 (emphasis added).

Thus, the lower courts here properly concluded that petitioners' criticisms are merely arguments "in terms of policy and broad generalities as to what the Railway Labor Act should provide," which are insufficient to disturb the Board's discretion.

> The very nature of these arguments indicates that the Board's choice of its proposed ballot is not subject to judicial review, for it was to avoid the haggling and delays of litigation that such questions were left to the Board. These are matters for Congress and the Board rather than the courts.

BRAC, 380 U.S. at 671.

II. THE PETITION RAISES NO ISSUE OF CONSTITUTIONAL DIMENSION.

Petitioners attempt to manufacture a basis for review by asserting (at 12-21) that their constitutional rights are violated because the Board's balloting process may, in a multi-union election, operate to certify a union which does not obtain absolute majority support. However, as petitioners concede (at 13-14), opponents of union representation have no constitutional right to refuse exclusive representation, or even compulsory association with or financial support of unions pursuant to a "union shop" or "agency shop" agreement authorized by RLA Section 2 Eleventh, 45 U.S.C. § 152, Eleventh. *See, e.g., Railway Employes' Department v. Hanson*, 351 U.S. 225, 233-38 (1956); *Machinists v. Street*, 367 U.S. 740, 759-69 (1961); *Ellis v. BRAC*, 466 U.S. 435, 444-48, 455-56 (1984).

Petitioners assert (at 14-21), relying solely upon Mr. Crain's affidavit, that the NMB's ballot procedure nonetheless violates the First Amendment because it (a) is not the method "least restrictive" of the employees' associational rights because it fails to "identify the majority's *true* choice in a close three-way election" and (b) creates an unconstitutional "irrebuttable presumption" in favor of representation by "discriminator[ily]" totaling the votes cast for each representative rather than requiring an outright and absolute majority.

The lower courts properly dismissed these contentions out of hand. This Court has recognized that the overriding "presumption" at work in the Board's balloting process is one *against* representation because "[a]ll [an employee] need do is not vote and this is considered a vote against" any representation and the "practicalities of voting—the fact that many who favor some representation will not vote—are in favor of the employee who wants 'no union.'" *BRAC*, 380 U.S. at 669 n.5.[3] Moreover, as the district court noted (A. 20a), the premise underlying petitioners' claims is false—there simply is no constitutional right to an absolute majority vote in a representation election (or even a Presidential or other political election). Finally, contrary to petitioners' demands for a "less restrictive" procedure, it is settled that the Board is not required to use *any* ballot, *BRAC*, 380 U.S. at 668, much less the one petitioners prefer. Indeed, the Board may, consistent with the Con-

[3] Indeed, the NMB's standard balloting procedure is the most *hostile* to union organizing of any used in labor elections, because its rule, unlike that of the National Labor Relations Board ("NLRB"), imposes a threshold requirement that an outright majority vote in favor of representation, with *all* non-voters presumed to oppose *any* union. The NLRB's procedure presumes that those who do not vote acquiesce in the voting majority's will, and the NLRB will therefore certify an organization that receives a majority of the votes actually cast, even if *less* than a majority cast ballots for representation. *See BRAC*, 380 U.S. at 670-71.

stitution, use ballot presumptions that assume that non-voters " 'assent to the expressed will of the majority of those voting.' " *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 560 (1937) (citation omitted). Therefore, the constitutionality of the Board's procedure, which requires opponents of representation to do *nothing* to "vote" against *all* unions, cannot be seriously questioned.[4]

In sum, the courts below correctly determined that petitioners' disagreements with the Board cannot create a constitutional violation. Their critiques are simply policy arguments for an election procedure more to their liking, which are "matters for Congress and the Board rather than the courts." *BRAC*, 380 U.S. at 671.

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[4] Petitioners' equally baseless due process claim, which relies upon (at 21-23) *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) and *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935), merited no comment from the courts below. These cases, which are based upon long-rejected notions that Congressional authority is non-delegable and subject to "substantive due process," shed no light on the constitutionality of exclusive representation and are therefore irrelevant to petitioners' argument. Indeed, *Carter* predates *Hanson*, and even *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which expressly declined to follow *Carter*, 301 U.S. at 41, and broadly concluded that the Wagner Act (creating the NLRB and adding to the federal regime of collective bargaining and exclusive representation) was a constitutional exercise of Congressional auhtority under the Commerce Clause. *See* 1 Hardin, *The Developing Labor Law* at 30-31 (3d ed. 1992). Petitioners' counsel was taken to task for pursuing this "frivolous" argument over a decade ago in *Knight v. Minnesota Community College Faculty Ass'n*, 571 F. Supp. 1 at 4, 15-16 (D. Minn. 1982) (three judge panel), *aff'd*, 460 U.S. 1048 (1983), *rev'd in part on other grounds*, 465 U.S. 271, 279, 291 (1984) (confirming that Court's summary affirmance rejected this claim).

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 21, 1996

No. 95-1175

Supreme Court, U.S.
FILED
MAR 5 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOSE R. BRAVO, JAMES G. HUTTO,
RICHARD D. LICHTERMANN, GROVER N. LIPE, JR.,
MARK S. LOMBARDO, EDWARD A. LYONS,
and STEVEN R. OLIVER,

Petitioners,

v.

NATIONAL MEDIATION BOARD and AIR LINE
PILOTS ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' BRIEF IN REPLY TO BRIEF IN OPPOSITION OF RESPONDENT AIR LINE PILOTS ASSOCIATION

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§ 2, Fourth 4, 5

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INTRODUCTION

Petitioners Jose R. Bravo *et alia* hereby reply to the Brief in Opposition of Respondent Air Line Pilots Association ("ALPA Br").

ARGUMENT

ALPA's arguments do not refute the contentions set out in the Petition, but instead highlight why review is necessary here.

I. The Railway Labor Act does *not* "leave[ ] it entirely up to the [respondent National Mediation] Board * * * to determine what constitutes a 'majority'." *Pace* ALPA Br at 4. A "majority" is a fixed concept: *viz.*, one more than one half of the employees eligible to vote in the election. *See* Petition at 10. The Board may not determine that a self-evident *minority* is a "majority"—*e.g.*, that only two votes for representation out of two thousand votes cast constitute a "majority".

In this case, the Board has used its "majority-of-the-majority" rule and a ballot which scientific investigation, including controlled experiments, has proven incompetent to determine a "majority".[1] The Board's use of a scientifically incompetent rule and ballot is no different in principle from its arbitrarily treating two votes out of two thousand as a "majority". If the courts have no jurisdiction to hear this case, then logically they also lack power to prevent the Board from determining a "majority" in any way it pleases. Then what purpose was served by Congress' specifying that a "majority" of employees has the right to determine union representation?

Petitioners' claims are not mere arguments "'of policy and broad generalities as to what the Railway Labor Act should provide'". *Pace* ALPA Br at 5. The Act mandates a *majority* choice among all employees eligible to vote—which ALPA does not deny. The Board's voting-rule and ballot are incompetent to determine the majority's choice—which must be taken as true here. Thus, rather than debating what the Act "*should* provide", petitioners are seeking to compel the Board to use rational election-procedures to ensure that the pilots at Federal Express receive the right the Act *does* guarantee.

ALPA does not—nor could it—explain how the knowing use by the Board of an election-rule and ballot that do *not* determine the will of the majority of employees is not a

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[1] At this stage in the proceedings, petitioners' allegations and supporting proofs must be taken as true. *See* Petition at 7-9 & n.6.

"gross violation" of the Act. Given that all the mechanisms of the Act for collective bargaining come into play only after a union has been selected as the representative, and given that this selection explicitly turns on the *majority's* choice, intentional participation by the Board in certification of a *minority's* choice must be the very apogee of illegality.

II. Petitioners do *not* "concede" that "opponents of union representation have no constitutional right to refuse exclusive representation". *Pace* ALPA Br at 5. To the contrary: Petitioners contend that *exclusive* representation by a *minority* union violates their rights under the First and Fifth Amendments. And *this Court has never held that exclusive representation by a minority union is constitutional.*[2]

That thirty years ago this Court *assumed* that the Board's ballot might favor employees opposing representation emphasizes why review is needed here. *BRAC* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965), *discussed in* Petition at 15. The Court's *assumption* licensed the Board to use the ballot thereafter. But Petitioners' scientific evidence (which must be taken as true) now proves the Court's assumption *wrong*. Appendix to Petition at 192a, ¶ (c). Thus, this Court, not the Board, has a peculiarly intense responsibility to stop continued use of a ballot proven to be

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[2] *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956), and *Machinists* v. *Street*, 367 U.S. 740 (1961), did not address exclusive representation at all. And *Ellis* v. *BRAC*, 466 U.S. 435, 455 (1984), held that certain expenditures by an exclusive representative under an "agency-shop" arrangement *could* violate the First-Amendment rights of nonunion employees. *Pace* ALPA Br at 5. *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), declared exclusive representation *un*constitutional in a statute passed under the Commerce Clause. And *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), did not follow *Carter* only because the Court construed the National Labor Relations Act as *not* providing for *exclusive* representation. *Contrast* ALPA Br at 7 n.4 *with* Petition at 21-23. The only case in which this Court ever upheld any form of exclusive representation involved a public-sector, not a Commerce-Clause statute, *and raised no claim that the union did not enjoy majority status. Knight* v. *Minnesota Community College Faculty Ass'n*, 460 U.S. 1048 (1983), *aff'g* 571 F. Supp. 1 (D. Minn. 1982). *See* Petition at 22 n.17.

grossly biased against the very employees the Court once erroneously assumed it favored.

That the Board may use one or another arguably valid presumption in its election-procedures is no defense. *Pace* ALPA Br at 6-7. This is not a case in which the Board has used the presumption that non-voters assent to the will of the majority of those voting, and a nonbiased ballot reflecting that presumption. It is even not a case in which the Board has used merely the presumption that non-voters should be counted as voting against representation, and a nonbiased ballot reflecting that presumption. This is a case in which—besides using a ballot scientifically proven to be *biased*—the Board has irrebuttably presumed that an employee voting for union *X* should be treated as wanting representation *in the abstract*, such that his vote for union *X* should also be counted for union *Y* in determining whether *Y* should be certified as the representative.[3] This Court has never held such an irrebuttable, nonrational presumption valid, especially when used in conjunction with a biased ballot.

CONCLUSION

That exclusive representation infringes on nonunion employees' freedom of nonassociation is self-evident. Whether exclusive representation is constitutional when a majority of

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[3] This is what ALPA means when it praises the Board for "impos[ing] a threshold requirement that an outright majority vote in favor of representation". ALPA Br at 6 n.3. The view of a majority as to "representation" in the abstract is not the issue, however. Rather, the employees are entitled to a majority vote on a *particular* union. *See* Railway Labor Act § 2, Fourth (emphasis supplied): "[t]he *majority* of any craft or class of employees shall * * * determine *who* shall be the representative". 45 U.S.C. § 152, Fourth. "*WHO* shall be the representative", not merely whether there shall be *some* representative. As occurred in this case, the Board's "majority-of-the-majority" rule determines only whether a majority has voted for *some* representative, and then irrebuttably presumes that the votes for union *X* (the "minority of the majority") should be imputed to union *Y* (the "majority of the majority")—resulting in the certification of an actual *minority* representative. *See* Petition at 5-6.

employees chooses the representative, it cannot possibly be so when only a minority makes that choice, unless every shred of concern for democratic fairness be set aside. The Railway Labor Act implicitly recognizes this, when it mandates that "[t]he *majority* of any craft or class of employees shall * * * determine who shall be the representative".[4] If ALPA is correct, however, the Act's command collapses into impotent blather, because the Board knowingly and intentionally may certify a union as the supposed "majority" representative by whatever procedure it likes—and no court may question that procedure, no matter how scientifically wrong, nonrational, or even preposterous it is.

This takes to a new nadir the question "What is truth?", with the answer: *nothing*. Facts and scientific experiments count for *nothing*. The duty of the courts to protect individuals' rights counts for *nothing*. The mandate of Congress counts for *nothing*. The Constitution counts for *nothing*. Law reduces to MacBeth's lament over a wasted life: "a tale told by an idiot, * * * signifying nothing".

MacBeth may, in fact, be right. The lower courts in this case did not shrink from accepting *sub silentio* such a conclusion. One hopes that this Court will do otherwise. The writ should be granted.

Respectfully submitted,

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[4] § 2, Fourth (emphasis supplied).